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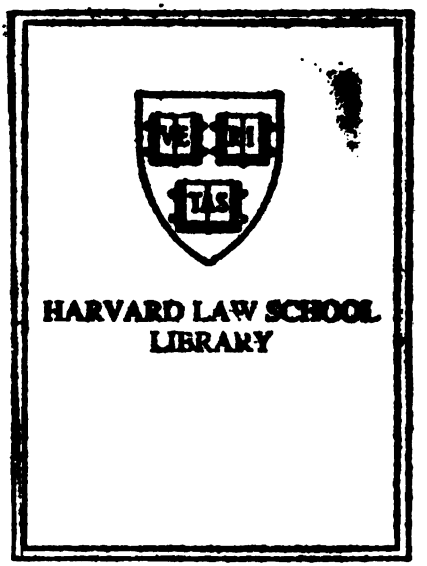

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THE

KENTUCKY

LAW REPORTER.

VOLUME VI,

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TABLE OF CASES.

REPORTED IN FULL.

	PAGE.
Adams' adm'r v. L. & N. R. R. Co.	686
Ainslie ads. Haldeman	397
Albritten ads. Matthews	786
Anderson County Bk. ads. Cochran, &c.	168
Anderson's adm'r v. Meredith	622
Armstrong v. Klienhans, &c.	561
Arnold ads. Com'w'th	181
Ashbrook v. Roberts	317
Atchison ads. Burch	636
Bagby v. Champ	250
Bamberger, Bloom & Co. v. City of Louisville	258
Bank of Kentucky ads. Callahan	188
Bank of Louisville v. Gray	68
Barbour, Sheriff, v. Lou. Board of Trade	769
Barker v. Warren	86
Barrow ads. Ky. Cent. R. R. Co.	240
Benge v. Hiatt's adm'r	714
Berry ads. Harris	157
Boone Co. Ct. ads. Com'w'th	755
Boulware, adm'r v. Pendleton	727
Bourbon Co. Ct. ads. Ky. Cent. R. R. Co.	495
Brannon & Co. v. Loving	328
Brizzalaro v. Senour, &c.	253
Buford v. L. & N. R. R. Co.	263
Burch v. Atchison	636
Burch's heirs v. Berch's heirs	691
Butler v. Wheeler	477
C. O. & S. W. R'way ads. Witty	321
Caldwell v. Perry	97
Callahan v. Bank of Ky.	188
Central Pas. R. R. Co. ads. Duncan	426
Champ ads. Bagby	250
City of Covington ads. Worthington	237
City of Louisville ads. Bamberger, Bloom & Co.	258
Cochran v. Walker's ex'rs	184
Cochran & Fulton v. Anderson Co. National Bank	168
Colley ads. Yarbrough	121
Commonwealth v. Arnold	181
Commonwealth ads. Crittenden	20
Commonwealth ads. Cummins	32
Commonwealth ads. Frankfort, Lexington, &c., Turnpike	391
Commonwealth ads. L. & N. R. R.	90
Commonwealth ads. Lisle	229
Commonwealth ads. Lowe	575
Commonwealth ads. Maiden	19
Commonwealth v. Mason	244
Commonwealth v. Messmore	131
Commonwealth v. Offutt	200
Commonwealth v. Oppenheimer	575
Commonwealth ads. Pence	113
Commonwealth ads. Perry	134
Commonwealth v. Pruett	195
Commonwealth ads. Rankin	407
Commonwealth ads. Redman	227
Commonwealth v. Rosenbaum	575
Commonwealth ads. Snapp	34
Commonwealth ads. Treacy	419
Commonwealth ads. Williams	764
Commonwealth ads. York	334
Commonwealth ads. Yost	110
Corn ads. Dugan	10
Covington v. Morton	352
Covington v. Norton	352
Crittenden v. Com'w'th	20

Digitized by Google

	PAGE.
Crow v. Owensboro R. R. Co.	6
Cummins v. Com'w'th	32
Davis & Kellar ads. Logan	137
Dawson v. Lee	413
Dodge's adm'r v. Moss	707
Donahue v. Drexler	14
Dougherty ads. Power	621
Drake's adm'r v. Semonin	341
Drexler ads. Donahue	14
Dugan v. Corn	10
Duncan v. Cent. Pass. R'way	426
Dunlop ads. Fontaine	201
Dupree ads. Henderson	702
Empire Coal & Mining Co. v. McIntosh	631
English v. Thomasson	267
Ferguson ads. Parrish	316
Flanagan v. Shuck	699
Fontaine v. Dunlop	201
Ford ads. Porter	60
Forman ads. Hall	473
Fort's adm'r ads. N. W. Ins. Co.	271
Frank v. Peyton	8
Frankfort, Lex, &c., Turnpike v. Com'w'th	391
Garrott v. Rotliff	72
Garrott v. Williams	72
Gayle v. Owen Co. Ct.	789
Gaylord ads. Pullman Car Co.	279
Gibson ads. Jones	628
Gibson v. Sublett's ex'r	645
Gray ads. Bank of Louisville	68
Gutenkuntz ads. Gas Co.	464
Haldeman v. Ainslie	397
Hall v. Forman	473
Harris v. Berry	157
Harris v. Merz Iron Works	65
Harris ads. Zable	462
Haselwood's ex'r v. Webster	376
Henderson v. Dupree	702
Henderson v. Mack	313
Hiatt's adm'r ads. Benge	714
Hiatt's adm'r ads. Massie	176
Hill ads. Lee	413
Hillman v. Hurley	682
Holloway ads. Rash	349, 711
Holman ads. Page's ex'r	617
Howard's adm'r ads. L. & N. R. R. Co.	163
Hurley ads. Hillman	682
Jones, Thos. C., in the matter of	638
Jones v. Gibson	628
Jones, Given & Co. ads. Robertson	71
Jones' adm'r v. L. & N. R. R. Co.	694
Kenny ads. Kentucky Central R. R. Co.	17
Kentucky Central R. R. Co. v. Barrow	240
Kentucky Central R. R. Co. v. Bourbon Co. Ct.	495
Kentucky Central R. R. Co. v. Kenney	17
Kentucky Central R. R. Co. ads. McMurtry	208
Kentucky Trust Co. v. Lewis	547
Kincaid v. Magowan	99
Kirk v. Williamson	108
Kleinhans ads. Armstrong	561
Kuykendall ads. Sullivan	481
L. C. & L. R. R. Co. ads. Shelby R. R. Co.	611
L. & N. R. R. Co. ads. Adams	686
L. & N. R. R. Co. ads. Buford	263
L. & N. R. R. Co. v. Com'w'th	90
L. & N. R. R. Co. v. Howard's adm'r	163
L. & N. R. R. Co. ads. Jones' adm'r	694
L. & N. Railroad Co. v. Wilhs	784
Ledford ads. Whitlock	387
Lee ads. Dawson	413
Lee v. Hill	413
Leeds v. Shaw's adm'r	26
Leight ads. Snowden	118
Lewis ads. Ky. Trust Co.	547
Lievney ads. Rooney	231
Likefield v. Likefield	640
Lisle v. Com'w'th	229
Little ads. O'Dell	29
Logan v. Davis & Kellar	137
Loran v. Webb	233
Louisville Board of Trade ads. Barbour	769

Digitized by Google

	PAGE.
Louisville City Nat. Bk. v. Loving	328
Louisville Gas Co. v. Gutenkuntz	464
Loving ads. Brannin & Co.	328
Loving ads. Lou. City Nat. Bk.	328
Lowe v. Com'w'th	575
Loyd v. Loyd	551
McIntire v. McIntire's ex'r.	559
McIntosh ads. Empire, &c., Coal Co.	631
McMackin v. Shelton	154
McMurtry v. Ky. Cent. R. R. Co.	208
McMurtry v. Vowells	719
Mack ads. Henderson	313
Magowan ads. Kincaid	99
Maiden v. Commonwealth	19
Maley ads. Wells	77
Mann v. Martin's adm'r	346
Martin's adm'r v. Mann	346
Mason ads. Commonwealth	244
Massie v. Hiatt's adm'r	176
Matthews v. Albritten	786
Meredith ads. Anderson's adm'r.	622
Merrifield v. Merrifield	568
Merz Iron Works ads. Harris	65
Messmore ads. Commonwealth	131
Mitchell v. Ripy	555
Mitchell ads. Stubbins	491
Moore v. Settle	58, 124
Morgan's adm'r v. Thompson	499
Morton ads. Covington	352
Moss ads. Dodge's adm'r	707
Newport Street Railway Co. ads. Widrig	760
Northwest, &c. Ins. Co. v. Fort's adm'r	271
Norton ads. Covington	352
O'Dell v. Little	29
Offutt ads. Commonwealth	200
Oppenheimer ads. Commonwealth	575
Owen County Court ads. Gayle	789
Owensboro R. R. Co. ads. Crow	6
Page's ex'r v. Holman	617
Parringen v. Pickens	498
Parris v. Ferguson	316
Paul v. Smith	531
Pence v. Commonwealth	113
Pendleton ads. Boulware's adm'r	727
Perry ads. Caldwell	97
Perry v. Commonwealth	134
Peyton ads. Frank	8
Phœnix Ins. Co. ads. Stephenson	196
Pickens ads. Parringen	498
Porchet's adm'r v. Scherzer	471
Porter v. Ford	60
Power v. Dougherty	621
Preston ads. Woolley	381
Prewett ads. Commonwealth	195
Pullmann Palace Car Co. v. Gaylord	279
Rankin v. Commonwealth	407
Rash v. Halloway	349, 711
Ratliff ads. Garrott	72
Redmon v. Com'w'th	227
Ripy ads. Mitchell	555
Roberts ads. Ashbrook	317
Robertson v. Jones, Given & Co.	71
Rochester v. Sledge	235
Rooney v. Lievney	231
Rosenbaum ads. Com'w'th	575
Scherzer ads. Porchet's adm'r	471
Scott v. Scott's ex'r	205
Semonin & Dixon ads. Drake's adm'r	341
Senour ads. Brizzalaro	253
Settle ads. Moore	58, 124
Shaw's adm'r ads. Leeds	26
Shelby R. R. Co. v. L. C. & L. R. R. Co	611
Shelton ads. McMakin	154
Shuck ads. Flanagan	699
Sledge ads. Rochester	235
Smith ads. Paul	531
Smith ads. Walker	457
Snapp v. Com'w'th	34
Snowden v. Leight	118
Stevenson v. Pœnix Ins. Co.	196
Stubbins v. Mitchell	491
Sublett's ex'r ads. Gibson	645
Sullivan v. Kuykendall	481
Thomasson ads. English	267
Thompson ads. Morgan's adm'r	499
Treacy v. Com'w'th	419
Van Bibber's adm'r v. Van Bibber	393
Vowells ads. McMurtry	719

Digitized by Google

	PAGE.
Walker v. Smith	457
Walker's ex'rs ads. Cochran	184
Warren ads. Barker	86
Webb ads. Loran	233
Webster ads. Hazelwood's ex'r	376
Wells v. Maley	77
Wheeler ads. Butler	477
Whitlock v. Ledford	387
Widrig v. Newport Street Railway	760
Williams v. Commonwealth	764
Williams ads. Garrott	72
Williamson ads. Kirk	108
Willis ads. L. & N. R. R. Co.	784
Witty v. C. O. & S. W. Railway	321
Woolley v. Preston	381
Worthington v. City of Covington	237
Yarbrough v. Colley	121
York v. Commonwealth	334
Yost v. Commonwealth	110
Zable v. Harris	462

Digitized by Google

TABLE OF CASES.

REPORTED IN ABSTRACT.

	PAGE.
Abernathy & Co. v. Nelson	651
Adams v. McClary	517
Adams Express Co. v. Marshall	291
Adkins v. Cracroft	397, 587
Adkinson v. Riley	653
Akers v. Percifull's adm'r	290
Akin v. Gooch	667
Alexander v. Fowler	444
Allen v. Kennedy	747
Allen v. Thompson	360
Anderson v. Avery	363
Apperson's ex'r v. Farmers Bank	743, 747
Arterburn v. Arterburn	740
Ashley v. Hobbs	741
Ashley v. Terry	740, 745
Bacon v. Bills	217
Bacon's adm'r v. Mut. Ins. Co.	222
Bagby v. Eversole	363
Baker v. Commonwealth	442
Baker & Rubel v. Whipps	307
Bamberger Bloom & Co. v. White	292, 307
Barbour, Sheriff, v. Goodloe	601
Barfield v. McMurtry	417
Barney & Smith, &c. v. Hart	300
Barr v. Steugel	450
Barrett v. Barrett	288
Bayse v. Lindenberger	540
Beall v. Beall	516
Beard v. Runyan	514
Beauchamp v. Miles	652
Bell v. Coleman	746
Betz v. Newport, &c., Association	222
Birkhead v. Kyle	301
Bland v. John	367
Boales v. Boulware	223, 225
Boston v. Commonwealth	222
Botto v. Botto	663
Bowen v. Shoemaker's adm'rs	600
Bowler v. Blair	659, 666
Bradford v. Ware's ex'r	304
Bradford v. Yelton	601
Bramel v. Clark	222
Branham v. Long	451
Brenner & Siler v. Renner	512
Bristow v. Peters	289, 300
Brooks & Waterfield v. Lovelace & Co.	368
Brown v. McCoun	362
Brown v. Witherspoon	525
Bryant v. Bryant, ex'r	293
Buckley v. Bromel	600
Buckley v. Rogers	451, 737
Buckner & Terrell v. Samuel,	660, 663
Burks v. Strader	369
Burns v. Buricke	586
Burns, gd'n, v. Ingersoll,	737, 741, 742
Bush v. Commonwealth	51
C. N. O. & T. P. R. R. Co. v. Barr	450
C. O. & S. W. R'way v. Bell	220
C. O. & S. W. R'way v. Commonwealth	308
C. O. & S. W. R'way v. Reasor	298, 509
Cain v. Commonwealth	517
Cain v. Hahn	295
Caldwell v. Glasscock	513
Caldwell v. Rainey	601
Callahan v. Harris	657
Cameron v. Beatty	589, 594
Campbell's adm'r v. Miller	598
Cannon v. Edwards	734, 738

Digitized by Google

	PAGE.
Carey v. Trustees of town of Butler	744
Carter Bros v. White	292, 307
Caudill v. Goeble, gd'n	515
Cavanaugh v. Fried	219
Chambers v. Commonwealth	444
Chamberlain v. McKinney	365
Chaney v. City Bank	215
Chelf v. Isaac	739
Chenault v. Pinkerton	655
Chilton v. Farmers' Ins. Co.	448
Cin. Southern R. R. v. Cummings.	442, 443
Cin. Southern R. R. v. Shropshire	449
Citizens' National Bk. v. Dronillard	588, 597
Citizens' Saving Bk. v. Miller, &c,	511, 522, 524
City of Paducah v. Green	224
Clark v. Doke's adm'r	655
Clay Fire Ins. Co. v. Hickman	308
Cline v. Smith	295
Coffey v. Ranney	366
Coflin v. Kelling	510
Commercial Pub. Co. v. Caldwell	369
Commissioners of Sinking Fund v. McDowell	520
Commonwealth v. Adair	306
Commonwealth v. C. N. O. & T. P. R. R.	306
Commonwealth v. Chattanooga Railway	521
Commonwealth v. City of Lexington	520
Commonwealth v. City of Paducah	292
Commonwealth v. Clark	301
Commonwealth v. Gest	307
Commonwealth v. Gibson	309
Commonwealth v. L. & N. R. R.	309
Commonwealth v. Montedonico	654
Commonwealth v. Myrick	522
Commonwealth v. Reynolds	520
Commonwealth v. Shanks	524
Commonwealth v. Sherman	657
Commonwealth v. Thomasson	288
Commonwealth v. Woodall	289
Commonwealth v. Wornicult	301
Concord v. Tollesboro Turnpike Co.	370
Conn. Mut. Ins. Co. v. Moss	49
Connelly v. Shadbourn	600
Connelly v. Zable	309
Continental Ins. Co. v. Commonwealth	450
Cook v. Lyon county	361
Cooper v. Hill	742, 746
Cooper v. Lyon & Co.	361
Corbett v. Johnson's adm'r	596
Cord v. Hendrick	365, 370
Counts v. Kitchen	216
Courts' adm'r v. Courts	512, 523
Cox v. Roach	670
Crabtree v. Johnson	359, 360
Cracroft v. Duncan	651
Craddock v. Ewing	309
Crawford v. Duncan	734, 749
Crume v. Spalding, Carothers & Co.	295
Cumberland River Lumber Co. v. Allen & Co.	741, 746
Cumberland River Lumber Co. v. Commonwealth	295, 659
Cummings v. Gerlick	509
Cummings v. Hamilton	365
Cunningham v. Wathen	443
Dameron v. Osenton	218
Dance's Trustee v. Dance's adm'r	740
Daniels v. Carter	585
David v. Hall	444
Davis v. Commonwealth, 450, 655, 658	
Davis v. Gatliff	739
Davis' gd'n v. Davis' adm'r	587
Davis & Co. v. Starks' ex'r	442
Dawson v. L. & N. R. R. Co., 659, 668	
Dawson v. Mann	296
Dean v. Dean's adm'r	652
Decker v. Commonwealth	653
Dickinson v. Beahr	359
Dicus v. English	215, 223
Dier v. Warman	307
Duck v. Halbrook	511
Dugan's adm'r v. Harris' adm'r	597, 599
Duke v. Commonwealth	597

Digitized by Google

	PAGE.
Duncan v. Commonwealth	447
Duncan v. Hardin	307
Dye v. Bramel	669
Ecton v. Smith	216, 218, 224
Elder's ex'r v. Weber	370
Elliott v. Coulter	748
Ellison v. Commonwealth	306
Emerson, Fisher & Co. v. Dye	592
Eubank v. Vance	294, 303
Eversole v. Steele	525
Fearons v. Taylor	743
Fearons v. Wright	747
Ferrill v. Cleveland	513
Figg v. Richardson	49
Finley v. Commonwealth	448
Finn v. Rochford	654
Fire Association, &c. v. Dickey	445, 447
Flannerey v. O'Brien	667
Fonda & Sons v. Field	440
Frazer v. Taliaferro	744
Froman v. Morrison	448
Fuller v. Wallace's ex'r	742
Funk v. Walter	293, 297
Galloway v. Soaper	295
Gardner v. Jackson	666
Gillham v. Baldwin & Co.	369
Goodwin v. Crider	48
Gordon v. Gordon	439
Graham v. Sheets	299
Graves v. King	298
Graves v. McKinney's adm'r	220, 224
Green v. Commonwealth	217
Green v. Dudley	221
Green, Dall & Co. v. Baker	214
Gross v. Houchen	439, 442
Haines v. Ky. Dist. Co.	451
Hall v. McGlothlin	661
Hamilton v. Grigsby	526
Hamilton's heirs v. Hamilton's adm'r	95
Hamlett v. Buckner	741
Hanks' adm'r v. Louisville, &c., Mail Line Co.	294
Hardin v. Hardin	662
Harding v. Abell	747
Harper v. Lee	744
Harris v. Lavin	297, 300, 304, 307
Harwell v. Stringer	745
Harwood v. Baldwin & Co.	656
Hayden v. Kollis' adm'r	510
Hazel & Co. v. McCloskey	736
Hendrix v. Moore	368
Herreld v. Skillem's ass'ee	666
Hickman v. Bradford	522
Hicks v. Soaper	364
Hicks & Carter v. City of Owensboro	226
Higgenbotham v. Meadows	661
Highbough v. Hubbard	511, 526
Hill v. Cannon	591
Hill v. Hill	216
Hinton v. Gano's heirs	526
Hite v. Cobb	663
Hite v. Hise	363
Hobbs v. Merrifield's ass'ee	652, 660
Hobson & Emery v. Broach	587
Holdsworth v. Commonwealth	591
Holiday's adm'r v. Watson	590
Holloway's ex'r v. Harris	658
Holmes v. Curtes	659
Holt v. Holt	661
Honaker v. Buckley	362
Hoskins v. Archer	671
Howard's adm'r v. Howard	516
Hudspeth v. Harrison	304
Huffman v. Commonwealth	306
Huffman v. Pollard	519
Hughes v. Nash	664, 669
Hummer, gd'n, v. Orndorff, ex'r	48, 49
Humphrey v. Hughes' gd'n	299
Humphries v. Commonwealth	594
Hundley v. Moore	519
Hunter v. Bertram	593
Huntzicker's adm'r v. Penn. Co.	662
Hutchings v. Frazer	448
Imperial Fire Ins. Co. v. Kiernan	302
Ivers v. Avery & Sons	220
Jackson v. Potter	518
James v. Buchanan	446
Jenkins v. Clark	736
Jenkins v. Neighbors	736
Jett v. Farmers and Traders Bank	654

Digitized by Google

	PAGE.
Johnson, rec'r, v. Atherton	660
Johnson v. Harrison	591
Jones' adm'x v. Rigney	596
Jones v. Strange	521
Jones v. Weaver's adm'r	665, 670
Judge v. Cash	444
Jump v. Commonwealth	50
Kaelin v. Rufenacht	736, 748
Kean v. Kean	217
Keegan v. McAtee	293
Kelley v. Broadus	594
Kemper Bros. v. Abbott	215
Kendall v. Webber	513
Kentucky Central R. R. v. Dunn's adm'r	367
Kentucky Central R. R. v. Thomas' adm'r	599
Kingsbury v. Haswell	591
Kirtley v. Higden	51
Kirtley v. Jameson	740
L. & N. R. R. v. Ballard	512
L. & N. R. R. v. Cambron	369, 370
L. & N. R. R. v. Collins	667, 668
L. & N. R. R. v. Murphy	662, 665
L. & N. R. R. v. Sharp	367
L. & N. R. R. v. Trenthy	95
L. & N. R. R. v. Wallace's adm'r.	302
Laird v. Laird	584
Lanfler, adm'r v. Ashley	748
Lawson v. Smith	519
Layne v. Weddington	590
Lear v. Smith's adm'r	657, 666, 667
Lebanon, &c, Turnpike Co. v. Creek Road	747
Lebanon, &c., Turnpike Co. v. Marion Co.	585
Lee v. Gates	585
Lemming v. Mullins	509, 523
Lenneu v. Fitzpatrick	518
Letcher v. Commonwealth	305
Levi v. Stallard	656
Lewis v. City of Louisville	225
Lewis v. Melvin	739
Lincoln Co. Ct. v. Hansford	734
Loog v. Bean	286
Louisville Gas Co. v. Gutenkuntz	444
Lyms v. Henderson	219
Lynn v. Stark	586
Lynn's adm'r v. Kennedy	589, 657
Lyter v. L. C. & L. R. R.	223
McClary v. Bridges	362
McClary v. Nash	299, 302
McClung, Day & Riley v. White	292, 307
McCormick v. McCormick	585
McCormick Harvesting Machine Co. v. Harned	665 668
McCormick Harvesting Machine Co. v. Ripley	658
McCrocklin v. Hiatt's adm'r.	742, 745
McDowell v. Linville	304
McKee v. Sypert	516, 519
McKinley's ass'ee v. Barney	304
McMeekin v. Stratton	224
Malone v. Bank of Adairville,	440, 452
Martin v. Martin's adm'r	451
Mason v. Beaseman	524
Mason v. Commonwealth	360
Mattingly v. Spalding	221
Mays v. Commonwealth	48
Medley v. McElroy	589
Meek v. Lacy	510, 516
Melvin v. Hawk & Bro.	592
Menifield v. Menifield't ass'ee	517
Merrill v. Commonwealth	664
Messmore v. Stone's adm'r	596, 598
Meyler v. Maramon	197
Middleton v. Commonwealth	51
Miller v. Clemmons	296
Miller v. Cummins	96
Miller v. Jones	364
Miller v. Mix	440
Miller v. Mt. Savage Furnace Co.,	293
Miller's adm'r v. Miller's ex'r	738
Mitchell v. Ken. Cent. R. R. Co.,	744
Moody v. Commonwealth	219
Moore v. Bush's heirs	670
Moore v Ormsby	362
Morris v. Commonwealth	370
Mowery v. Webb	360, 368, 369
Muldoon v. Hite	663
Mulhagen v. Carter	735, 746

Digitized by Google

	PAGE.
Mulliken v. Sieber	302
Mullins v. Pendleton County Court	598, 600
Nave v. Collier	602
Neal v. City of Louisville	300
Neal v. Commonwealth	568
Nevin v. Allen	511, 514
Newcomb v. Newcomb	669
Nickles v. Mercke's ex'r	526
Norris v. Cheatham	223
Northcutt v. Curry	588
Northern Ins. Co. v. Kiernan	302
Nunn v. Pedigo	743
Ogden v. Ogden	310
Ormsby's gd'n v. Sherley's ex'r	670
Osborn v. Commonwealth	47
Querbacker, Gilmore & Co. v. White	735, 739
Owens v. Anderson	446
Owensboro Savings Bk. v. Mattingly	517
Owensboro Water Co. v. City of Owensboro	665
Paducah, City of, v. Green	224
Paducah Lumber Co. v. Langstaff	445
Palmer v. Commonwealth	370, 510
Palmer's ex'r v. Turner	47
Parker v. Hamilton	590, 596
Parker v. Smith	301, 309
Parrott v. Commonwealth	221
Pelley's adm'r v. Rigny	522
Peters v. Commonwealth	523
Pfeeger v. Stiver	599
Pitchford v. Foster	656, 664
Pool v. Allinsworth	594
Potter & Co. v. Marion	653, 656
Pottingen v. McLure	597
Pottinger v. Owensboro Water Co	449, 453
Potts v. Powers	509
Preston v. Stengel	451
Prewitt v. Ky. Cent. R. R.	522
Prewitt v. Prewittt	513
Priest v. Taylor's adm'r	216, 221
Pulliam v. Commonwealth	305
Rainey v. Commonwealth	524
Rankin v. Commonwealth	407
Ranson v. Rogers	291
Rarrick v. Clay	360
Ratliff v. Faunin	598
Ray v. Grove	736
Ray v. Life Association	515
Reading v. Davis	661
Reamer v. City of Louisville	748
Reed v. Reed	521
Reever v. Davis' adm'r	288, 514
Reid v. Jackson	743
Reidhar v. Pfeiffer	735
Richey v. Commonwealth	515
Ritchie v. Grove	595
Robb v. Savings Bank	215
Robertson v. Given, Jones & Co.	214
Robinson v. Basham, ass'ee	445
Robinson & Co. v. Basham & Cox	510
Roe v. Commonwealth	364, 368
Rosen, adm'r v Holland	225
Rosenberg & Nathan v. Thompson	366
Rousseau v. Flower's adm'r	298
Ryland v. Suire	303
Sachs v. Hesse	652
Sanders v. Brooks	671
Sandy v. Lindsay	737
Scaggs v. Fife	659
Schmidt v. Oliges	297
Schuk, gd'n, v. Stoll	365
Scott v. Baldwin & Co.	214, 218
Scott v. Wilson	308
Sewell v. Combs	303
Sexton v. Commonwealth	441
Shanks v. Stephens	516, 525, 526
Shaw v. Carrick, &c.	653, 671
Shippen v. Stoke's adm'r	449
Shirley v. Burch	446, 450
Shultz's ass'ee v. Beatty	662
Simrall & Bodley v. Morton	735
Smith v. Commonwealth	305
Smith's adm'x v. Smith	458
Smith's adm'r v. Smith's adm'r	217

Digitized by Google

	PAGE.
Snelling's adm'r v. Atchison . .	299
Southern Express Co. v. Gutman,	587, 654
Southern Mut. Life Ins. Co. v. Graham	446
Southern Mut. Life Ins. Co. v. Hancock	447
Southern Wheel & Handle Co. v. Moorman	366, 369
Sparks v. Commonwealth . . .	289
Spencer v. Commonwealth . . .	222
Starnes v. Maloney	744, 745
Stivers v. Commonwealth . . .	95
Stone v. Stubblefield's adm'r . .	443
Stower's adm'r v. Hollis	590
Strossman *ex parte*	738
Stuart v. Troutman's adm'r . .	447
Sugg v. Commonwealth	50
Suter v. Stamper & Son	745
Sweatman v. Spears	515
Tabb v. Mudd	220
Tabler v. Cord	365, 370
Tandy's ass'ee v. Hatcher & Co.	745, 746
Taylor v. Berry	523
Thomas v. Smith	737
Thompson v. Lyon county . . .	361
Townsend and Massie v. Ditto .	290
Tracey v. Symmes	288
Trunk's Committee v. Eastern Lunatic Asylum	521
Tucker v. Hume	588
Turley v. Vanarsdale	364
Unger v. Bamberger	447
United States v. Lilly	582
Unz v. Oswald	518
Wade v. Board of Trustees, &c. .	214
Walker v. Bush	514
Walker v. Chenning's ex'r . . .	301
Walker v. Goodloe's ex'r . .	588, 601
Walker v. Smith	457, 671
Wallace's adm'r v. Pigg	595
Ward v. Crotty	518
Ward v. Ward	522
Warmoth v. Fitchen	584, 586
Warmoth v. Tobin	586
Warmoth v. Wright	584, 586
Watts v. Bush	740
Weber, &c., v. Stengel	451
Welch v. Ward	584
Wells v. Weaver	665, 670
Wells v. Wells	216
Western Assurance Co. v. Layer .	593
Whallen v. Wetzell	50
Wheatley v. Hay's heirs	517
Wheeler v. Glenn	290
Wilcox v. Parker	450
Wilcox, Cope & Co. v. Buckner .	655
Williams v. Commonwealth . .	764
Williams v. Rose	517
Wilson v. Hodges' gd'n	296
Wiseman v. McAlpin, &c. . . .	660
Yeiser v. Todd	594, 597
Young v. L. & N. R. R.	309

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The Kentucky Law Reporter

EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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VOLUME VI.

With the present number we commence the sixth year of our existence, which, for a law periodical (bearing in mind that they do not reach a longevity equal to humanity), is quite venerable.

We shall continue to publish all decisions of the Court of Appeals—those marked for publication by the court will be published in full—others will be abstracted. This places within reach of the profession at the end of each month every utterance of that court and removes from counsel all danger of having an unreported decision suddenly unearthed on him to his own dismay.

Besides this we shall publish in full or abstracts of such cases of the Superior Court as are thought of general interest because involving new principles, or some novel application of an old one or some question of practice in that court.

Those of our subscribers who have not already settled up for the year July, 1883—July, 1884, will confer a favor if they will remit at once to the publisher, Mr. Geo. A. Lewis, Frankfort, Ky.

Those who do not respond to accounts sent them will take no umbrage at drafts drawn on them for the subscription price.

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It is impossible to conduct a paper on a list of unpaid subscriptions. We do not propose to try it.

CURRENT TOPICS.

The third annual meeting of the State Bar Association was held in Louisville on the 26th and 27th of June. A full report of the proceedings will shortly be issued. The following are the officers chosen for the ensuing year.

President—Wm. Lindsay, of Frankfort.

First Vice-President—John W. Finnell, of Covington.

Second Vice-President—R. P. Jacobs, of Danville.

Treasurer—J. A. Beattie, of Louisville.

Secretary—Horace C. Brannin, of Louisville.

Executive Committee—W. O. Harris, Thomas Speed, Louisville; D. H. French, Lagrange.

Committee on obtaining the sense of the people on the question of amending the Constitution: B. F. Buckner, Louisville; H. C. Burnett, Paducah; W. F. Browder, Russellville; Jno. Mason Brown, Louisville; W. L. Porter, Glasgow; H. L. Stone, Mt. Sterling; R. W. Nelson, Newport; Laban T. Moore, Catlettsburg; Robert Boyd, London; Curtis F. Burnam, Richmond.

Committee to secure a Codification of the Law: Wm. Reinecke, Louisville; C. B. Seymour, Louisville; J. W. Head, Shelbyville; H. C. Brannin, Louisville; W. F. Browder, Russellville.

The next annual meeting will be held in July, 1885.

In New York both the Democrats and Republicans have united in nominating the same men, Judges Andrews and Rapallo, as candidates for their Court of Appeals. This is very fortunate; saves the need of a canvass for the office, and relieves a judge from the temptation of taking his seat on the bench under the obligation to punish enemies and reward friends. A judge should know neither friends nor enemies. He should be as blind as the goddess under whose statute he sits.

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In Sturtevant v. Hawes, 19 N. W. Rep., 617, the Supreme Court of Nebraska refused to take a child, whose mother was dead, from its grandparents, and deliver it to its father, although he was admitted to be a worthy person, with ample means to care for the child. We think this decision is wrong. The father is charged with the duty of supporting his child, and, therefore, should have the custody of it. We know of only two exceptions to the rule—one where he is unfit to be entrusted with such custody, or where, on account of the tender age of the child, its mother is allowed to retain it. The exception has never been extended to the grandparents, and it is dangerous to the welfare of the child to so extend it, since the grandparents are under no legal obligation for its support, and may throw it off at such time when, by long absence, the father has become alienated from it. His affection makes a stronger bond for the child's support than the mere legal obligation, and it should not be weakened.

At the recent meeting of the State Bar Association a committee was appointed by a unanimous vote of the association to secure the appointment by the next Legislature of a commission to codify the laws of this State. We hope soon to see Kentucky take her place along with California, New York and other code States.

Our correspondent who wants to know something about the recent decision of the U. S. Supreme Court on the Legal Tender question will find a very interesting article in the American Law Review for May-June, by Ex-Gov. Chamberlain, of South Carolina, reviewing the decision (Juillard v. Greenman), and comparing it with Hepburn v. Griswold, 8 Wall., 603, in which the court held by a majority of one that the Legal Tender Act was unconstitutional, and with Parker v. Davis, 12 Wall., 457, in which they held by the same majority of one that the same act was constitutional. This change of opinion, as is generally known, was brought about by the death of two of the judges who sat in the first-named case, and the appointment as their

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successors of judges favorable to the act. It is insisted that the recent case of Juillard v. Greenman is different from the foregoing, in that it involves the question of the legality of legal tenders issued in time of peace, while the former cases presented the question of their validity when issued in time of war, and as a war measure. Judge Gray, who delivered the opinion, is charged with overlooking this difference.

An enterprising law writer has taken the trouble to make up a table showing the relative value of different reports. All the Massachusetts, all the New York Court of Appeals, and all the Pennsylvania reports are placed in the front rank. In this State the Dana's are also ranked high, but alas for those of us who live in the present day, the glory seems to have departed from us; 79 and 80 Ky., are in class D., i. e., the last. We suggest that this fact ought to have some effect on 81 Ky., which is soon to appear. A volume of reports without a good index is of no service to the profession, and, not to put too fine a point on it, the index to neither 79 nor 80 Ky. is good, but, on the contrary, very bad. We look for something better in the next volume.

A REVIEW OF MANTLE v. BEAL.

A year ago I took the liberty to review Suter v. Medlock, involving the thirty years' limitation, in these pages. In Bransom v. Thompson, 5 Law Rep., 362, there are some dicta carrying its doctrine further, but in the late case of Mantle v. Beal, ib., 892 the court went to the furthest end, making not only of its own will a new statute of limitation, but a new and retrospective statute of conveyances. It decrees that every deed, void by reason of the grantor's disability, shall become valid in thirty years, though during all that time the grantee's possession was rightful, and the grantor, therefore, had no right of action.

Husband and wife, before the married women's act of 1846,

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convey the wife's land, without her acknowledgment. The husbands' deed, as the law then stood, carries his life estate; for every grant is good as far as it can be made by the grantor.

The purchaser's possession is rightful; the husband lives more thirty years; immediately upon his death the wife's children and heirs bring suit.

They are guilty of no laches; they could not have sued a moment sooner; but the court bars them under the thirty years' clause in these broad, sweeping words:

"It is not so much a question as when the cause of action accrued, but a question as to whether title passed after the thirty years, and there is no doubt but it would have passed but for the disability. * * * Under the thirty years' statute the fact that the vendor was a married woman can make no difference."

In other words, it is here proclaimed that the statute of limitations, enacted in 1852, proposes to give force to a conveyance made in 1843, from the year 1873 onward. The same court had decided in the good old days, in Pearce's Heirs v. Patton, 7 B. Monroe, that the legislature has no power to legalize a former void conveyance.

Understand that Mantle v. Beal, supra, might have been decided, as it was, on these grounds. The pleadings justified the assumption that the deed of Beal and wife was made in 1846, after the married women's act was passed, and when the husband could not transfer the title and possession of the wife's land. If so, the wife had the immediate right to the land, and her only disability would have been that of suing without the husband's consent, which does not excuse her after thirty years. Or the court might have taken the ground that the conveyance, being in its form executory (so it is stated in the opinion), would, under the old practice, not have defeated an action of ejectment, which husband and wife could have brought at any time after the purchaser took possession. But the court chose to plant itself on the broad ground that after thirty years a void deed becomes valid. For this the following clause of the law (General Statutes, chapter 11, article 1, section 4) is quoted:

"The period in which an action for the recovery of real property may be brought shall not in any case be extended beyond

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thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims, by reason of any death, or the existence or continuance of any disability whatever."

The italics are my own. It will be seen that the statutes do not connect the accrual of the action with the disability. It speaks of the disability to bring suit, and that is not absolute; it is only an excuse for supposed laches; for a wife may sue with her husband's consent, and often without it, an infant or lunatic through his guardian, committee or next friend. The very words "any deaths" make the meaning clear; they refer to the cumulation of disabilities under the older statutes.

The ground assigned for this extraordinary departure is the supposed hardship of the case. I don't admit that there can be any such hardship. A man has no business to buy or to improve land without first looking into the public records at the county seat. The defendants must have known that there was no valid deed from Mrs. Beal, for she could only convey by record. It is as easy to look back thirty-five years as thirty-five months. If these notions about hardships are to prevail, we might as well do away with the record of deeds.

A court that must sometimes in its adherence to technical rules run counter to popular prejudice should not yield to it on other occasions, least of all on a question of mine and thine, on a title to land, where certainty is all important. Kentuckians are still proud of Mills, Boyle and Owsley, and their stern enforcement of the most unpopular legal rights.

L. N. DEMBITZ.

KENTUCKY COURT OF APPEALS.

CROW v. OWENSBORO & NASHVILLE R. R. CO.

(Filed May 29, 1884.)

1. Pleading—Relief—Rescission—Where the facts set out in the petition show grounds for only partial rescission of a contract, complete rescission can not be granted under a prayer for general relief. Under such a prayer only such relief can be granted as is consistent with the facts set out in the pleadings.

Appeal from Daivess Circuit Court.

Opinion of the court by Judge Hines.

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In 1869 appellant executed to appellee a conveyance for five and two-thirds acres of land containing these provisions: "For and in consideration of a depot being located on the same, we hereby bargain, sell and convey to the Owensboro & Russellville R. R. Co." a certain defined boundary of land, and concluding: "In this transfer it is to be distinctly understood that said land is to be used by said railroad company for railroad purposes solely, and in case of any violation of this agreement by said company, then said land shall revert to us."

On the 15th of January, 1880, this suit was filed, alleging the construction of the railroad over the land, and its operation, but charging that no depot building had been erected thereon; alleging the width of the land occupied and necessary to be used in operating the road, and seeking to recover that portion of the land not necessary to the operation of the road. The petition closed with this prayer: "Wherefore, the plaintiff prays that the court adjudge said lands have reverted to the plaintiffs; that said deed be declared void; that plaintiff have possession thereof and for judgment for his costs and all proper and general relief."

The evidence tends to show that the road was constructed within a reasonable time, and operated with but little interruption up to the institution of this action, but also shows that no depot building was erected on the land.

There is in the petition no allegation that there was a failure, within a reasonable time, to erect or establish a depot building, nor is there any allegation of any demand or request to establish such a building, nor of damages resulting from such failure.

Section 90 of the present Code of Practice in civil cases which provides: "The petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled, and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled. If no defense be made the plaintiff can not have judgment for any relief not specifically demanded, but if defense be made he may have judgment for other relief, under a prayer therefor," is simply an affirmation of what the practice was prior to the adoption of this provision.

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Under that practice it was required that in order to have relief under a general prayer the relief must be consistent with that specifically prayed, as well as with the case made by the bill. (1 Daniel's Chancery Pleading and Practice, 378.)

Here the relief sought is inconsistent with that set out in the petition as well as with that specifically prayed. The petition sets forth an action for the partial rescission of the contract, while the prayer is for a complete rescission.

The erection of the depot appears to have been one of the considerations for which the conveyance was made, but not the sole consideration, and probably not the material consideration; but whether this court could reverse as the pleadings stand, if the erection of the depot were the main consideration, need not be considered, since the pleadings and the prayer to the petition are inconsistent and irreconcilable with the relief sought on this appeal.

Judgment affirmed.

Geo. W. Jolly for appellant.

Weir, Weir & Walker for appellee.

FRANK v. PEYTON.

(Filed May 31, 1884.)

1. Jurisdiction—Injunction—A having purchased of B a tract of land in Illinois and taken his deed for it, discovered that the deed was so defectively acknowledged that it could not be recorded there; B on learning this was trying to take advantage of it by selling the land a second time on an innocent purchaser, Held—A court of equity in Kentucky has jurisdiction to enjoin B from making the sale, he being within the process of the court, although the land was not.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, J. H. Frank, purchased of Peyton and wife a tract of ten acres of land lying in Cook county, Illinois, for which he paid Peyton $500, and accepted the deed of the grantors, passing to him, as he supposed, such a legal title as could be recorded. The mode of acknowledgment was so defective as by the law of Illinois prevented it going to record as evidence

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of title against innocent purchasers. He holds the legal title, but on such condition as will not protect him against those who may purchase of his vendor.

These facts are alleged in a petition in equity filed by the appellant, with the further allegation that the appellees were attempting to dispose of the property by sale to others, and that by the law of Illinois the innocent purchaser would hold as against an unrecorded deed. An injunction was obtained prohibiting the parties from selling until the questions raised by the petition could be determined.

The appellees filed a demurrer to the jurisdiction and also an answer, alleging that the deed was in the nature of a mortgage and so intended by the parties when executed, etc.

When an issue was tendered by the reply to the answer the court below sustained the demurrer to the jurisdiction and dismissed appellant's petition.

The facts disclosed in the petition shows clearly that the appellant is the owner of the land by reason of the conveyance from the appellees, and that this title is imperiled by the efforts on the part of the appellees to sell the land to some one else. They had received of the appellant the purchase money and were attempting to deprive him of his title, and, being insolvent, the remedy in the warranty was ineffectual, or, even if solvent, the appellant was entitled to such a conveyance as would protect him against all parties. This is not an effort to sell the land to raise the purchase money paid by the appellant, but the chancellor is only asked to require the appellees to do what they agreed and attempted to do by the delivery of the deed with the defective acknowledgment; that is, make them such a conveyance as by the law of Illinois can be recorded so as to notify third parties of appellant's titles. This proceeding in equity acts upon the person and the fact that property in another jurisdiction may be affected by it is no objection to the relief. The relief sought or the action brought is purely transitory, and there is no reason for requiring either of these parties, both living in this State, to seek the aid of an Illinois court for the relief to which the appellant, if his statements are sustained, is clearly entitled.

In the case of Massie v. Watts, 6 Cranch, 148, Watts, a citizen of Virginia, brought an action in equity against Massie, a

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citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the State of Ohio, upon the ground that Massie had obtained the legal title with notice of the plaintiff's equitable title. This bill was sustained and the relief granted. The present action is not an attempt to recover the land by a better or superior title, but to cure a defect in an executed agreement, defective merely in its acknowledgment, and there is no reason, when the mode of curing the defect is clearly pointed out, why the relief should not be given. Judgment reversed and cause remanded, with directions to overrule the demurrer to the jurisdiction and for proceedings consistent with this opinion.

It is not insisted in argument that the feme can be compelled to relinquish her dower by the chancellor.

Kincheloe & Eskridge for appellant.

Jno. Allen Murray and Wm. R. Haynes for appellee.

DUGAN v. CORN.

(Filed June 5, 1884.)

1. Deed—Acknowledgment—Record—Under Revised Statutes, chapter 24, sections 14 and 23, the deed of a married woman is not valid unless lodged for record within eight months from the date thereof. If not lodged within that time it must be re-acknowledged before it will become valid.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Lewis.

Thomas Dugan, husband of appellant, in May, 1867, sold, delivered possession of, and executed a covenant to convey to McBrayer two lots of land in the town of Carrollton, whereon was a hotel building, in consideration of $1,350, for which a bill of exchange was drawn, and a lot of whisky to be thereafter delivered.

In February, 1868, an action on the bill of exchange was instituted by Dugan against McBrayer and others in the Jefferson Court of Common Pleas, which was afterwards transferred to the Louisville Chancery Court, when in June, 1869, a personal judgment was rendered for the amount sued for.

During the pendency of that action, to which defense was

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made, Dugan filed with his pleading and tendered in court a deed to the hotel property executed in December, 1867, by him and appellant to McBrayer, which appears to have been acknowledged in due form of law by each of them.

In July, 1868, Dugan instituted an action in the Carroll Circuit Court to recover judgment for the value of the whisky, which he alleged McBrayer had failed to deliver, and for the enforcement of his lien on the property sold. In his petition he stated that in accordance with his contract he had executed and tendered to McBrayer a deed conveying to him the property, retaining a lien as was agreed in the title bond, which deed was then on file in the Louisville Chancery Court.

To that action no defense was made, and in September, 1868, judgment was rendered against McBrayer for the value of the whisky, and for a sale of the property to satisfy it. And afterwards it was, in pursuance of the judgment, sold and purchased by one Brewer, who transferred his bid to appellee, the latter paying the purchase price, and in March, 1870, receiving a commissioner's deed and the possession of the hotel property.

Thomas Dugan died in March, 1873, and in April, 1868, appellant instituted this action for the allotment to her of dower and recovery of one-third in value of rents accruing from that time.

The deed executed by Thomas Dugan and wife in December, 1867, and tendered to McBrayer, was never recorded or lodged for record in the proper office until August, 1878, when it was withdrawn by appellee from the Louisville Chancery Court, and, as appears from the certificate of the clerk of the Carroll County Court, produced to him and admitted to record in his office.

The question now presented is whether appellant is, notwithstanding the deed duly executed and acknowledged by her husband and herself to McBrayer in 1867, entitled to dower in the hotel property.

Section 14, chapter 24, Revised Statutes, which has been readopted in the General Statutes, is as follows: "Deeds made by residents of Kentucky, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration not having notice thereof, or any creditor, except

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from the time the same shall be legally acknowledged or proved and lodged for record unless the same be so lodged within eight months from the date thereof."

Section 23 provides that "where deeds have been or may be legally executed, but not recorded or lodged for record in proper time, such deeds may be proved or acknowledged and recorded, and be as effectual from the time of so recording as if recorded in proper time. This section shall not apply to the deed of a married woman unless re-acknowledged by her and recorded thereafter in proper time."

According to the construction by this court of statutes on the same subject existing previous to the act of 1831 (Statute Law, 453) which were not essentially different from the two sections just quoted, "the obligatory force upon a married woman of a deed executed by her depended upon it being recorded or lodged in the proper office within eight months from its date, and this not being done, it became incapable of being rendered obligatory except by her own act" (Applegate v. Gracy, 9 Dana, 215; Scarborough v. Watkins and Wife, 9 B. Monroe, 540). And the Revised Statutes have, since their adoption, been construed the same way. (McGuire v. Bowman, 13 Bush, 550; Burton v. Shotwell, 13 Bush, 271.)

The tenth section of the act of 1831 in substance provides that deeds which have been or shall be duly proved and acknowledged, but not lodged for record in the proper office within the time prescribed by law may, nevertheless, be recorded, and from the time of recording be as effectual as if recorded in proper time.

That section is substantially the same as section 22, chapter 24, General Statutes, and from both of them is omitted the exception in favor of married women contained in the last clause of section 23, Revised Statutes, quoted.

In the case of Applegate v. Gracy, supra, the deed of the feme covert was made, and the time prescribed by law in which it might be lodged for record had expired before the passage of the act of 1831, and the court for that reason held the tenth section did not extend to or apply in that case. And although the question, whether by fair construction the section could be made to apply to a deed of a feme covert in any case, as well

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as the question of legislative power to give vitality to a deed that had already lost its obligatory force, were suggested. In the opinion of the court it was not deemed necessary to decide either of them.

In the case of Finley, &c. v. Spratt, &c., 14 Bush, 225, it was held that "the deed of a married woman, like that of a person sui juris, will be good against a purchaser for a valuable consideration, or against creditors from its date, if it be legally lodged for record within sixty days thereafter, and, if not lodged for record within that time, it will be effectual whenever so lodged." But in that case the deed was executed after the adoption of the General Statutes, which were held to be materially different from the Revised Statutes on the same subject.

The construction given by this court to the Revised Statutes, as well as similar statutes existing previous to 1831, has been uniform, and adhered to too long to be now called in question. And as the Revised Statutes were in force at the end of eight months from the time the deed was executed and acknowledged in 1867, as well as when the death of Thomas Dugan, the husband of appellant, occurred in 1873, when what was before a contingent right of appellant to dower in the hotel property became vested and certain. They must be held to govern in this case. For, independent of the ruling of this court heretofore on the same subject and of the question of constitutional power that might have arisen, the legislature has expressly provided in section 3, article 1 of the act adopting the General Statutes that no right before that time established, accrued or accruing, should be affected thereby.

There is nothing in this record to show that appellant ever re-acknowledged the deed made by her husband and herself to McBrayer in 1867, which is now relied on to defeat her claim to dower; in fact it clearly appears she never has done so.

She was not a party to the action of her husband against McBrayer and others in the Louisville Chancery Court, nor to the one in the Carroll Circuit Court, and consequently she is not bound or estopped by the proceedings had in either.

She executed and acknowledged the deed in 1867, and it was not by reason of any fraud on her part that it subsequently became inoperative, but simply because McBrayer failed to

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cause it to be lodged for record within the time required by law. Nor was the failure by appellee to require a re-acknowledgment of the deed of 1867, or relinquishment of her dower as a condition of his acceptance of the commissioner's deed and payment of the purchase price for the hotel property caused by her, but must be attributed to his own neglect.

It does not make any difference whether the deed of 1867 was delivered by Thomas Dugan, or thereby tendered and not accepted by McBrayer; for, by reason of the failure to lodge it for record in the proper office within eight months from the time it was acknowledged by appellant, it ceased to be obligatory upon her, and her contingent right of dower thereafter existed as if the deed had never been acknowledged at all.

Wherefore, the judgment dismissing appellant's petition is reversed and cause remanded for further proceedings consistent with this opinion.

W. B. & H. M. Winslow for appellant.

Masterson & Gaunt for appellee.

DONAHUE v. DREXLER.

(Filed June 3, 1884.)

1. Res adjudicata—A sued B for assault and battery, but dismissed the suit settled, and he having died shortly afterwards, his widow brought suit under General Statutes, chapter 1, section 6 against B. claiming that her husband had died of the injuries inflicted by B, Held—The former suit for assault and battery was no bar to her action.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Hargis.

In January, 1881, John Donahue brought suit for assault and battery against Frederick Drexler. On the 25th of the following April it was, by written agreement, dismissed settled, each party paying his own costs. Donahue died the 8th day of May and his wife, the appellant, on the 24th of September, 1881, instituted this action against Drexler for reparation of the injury resulting to her from the killing of her husband. Her suit is based upon the sixth section of chapter 1, General Statutes, which reads as follows: "The widow and minor child or

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children (or either or any of them) of a person killed by the careless, wanton or malicious use of fire arms, or by any weapon popularly known as colts, brass knucks or slung shots or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury, and in such action the jury may give vindictive damages." To the petition the appellee filed a general traverse and also pleaded in bar of the appellant's action the former suit of her husband for assault and battery.

The appellant demurred to the plea in bar, which was overruled, and failing to reply her petition was dismissed. From the judgment dismissing her action she has appealed.

Does the former suit of the husband for assault and battery and its settlement constitute a bar to her cause of action under the statute is the question to be determined.

According to chapter 10, General Statutes, actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury cease with the death of the person and can not be brought or revived by the personal representative. The right of action for all other personal injury or injuries to real or personal property survive, notwithstanding the death of the person injuring or the person injured.

It has been held in the case of Hansford's Administratrix v. Payne & Co., supra, 11 Bush, 385, that this chapter does not authorize suit by the personal representative where death from the injury is instantaneous, its object being to except certain classes of personal injury and injuries to property from the common law rule that personal actions die with the person. That it creates no new causes of action. The same construction was given the statute in the cases of Murphy and Case, 9 Bush.

The case of Connor's Administratrix v. Paul, 12 Bush, 144, has no application to an action like the present, for there the suit was by the personal representative for the death of the intestate under an Indiana statute, and the point decided was that the same personal representative could not maintain another action for the mental and bodily suffering of her in-

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testate which survived under the common law. As the cause of action was based upon the same facts, and the degree of negligence required by the statute being merely higher than at common law, the personal representative was held to an election because an action for the death was a bar to the common law action for mental and bodily suffering before death (14 B. Monroe, 165). It was also decided in Hansford's Administratrix v. Payne & Co., 12 Bush, 385, that "a recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury or any of its consequences, and if a party elects to sue and enforce the right of action that survives to him he will not be allowed afterward to avail himself of the benefits of the punitive statute, and also to recover under its provisions."

Those cases were decided upon a different state of facts from the one before us. The recovery in them could have been made only by the personal representative for the pecuniary injury to the estate. There is much good reason to sustain the position of those cases in the fact that the personal representative could do only what the deceased could have done, had death not ensued.

The representative stands for the deceased, his estate and the rights of his creditors therein, and he should not be allowed to carve up the cause of action any more than the deceased, had he survived the injury. In this case we find two causes of action, with different purposes and reasons for their existence.

The suit for assault and battery could not have survived to the personal representative, for the statute says it shall die with the person injured or injuring. It was a personal action purely for the bodily injury, not for pain, suffering and loss of service to his wife and children after the injury and before death, and the compensation which he had the right to was extinguished by his death or the settlement which he made. But his right of action for the bodily injury from the assault and battery is wholly distinct from the action which the widow and minor children may have for reparation of the injury resulting to them from the death of the injured. This statute creates a new grievance, a new cause of action, in which neither the deceased nor his estate has any interest, and for which his administrator could not sue. It is based upon the wrong to

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the wife and children by depriving them of their natural support and protection which the law gives them in the husband and father.

The injury is to them and their rights. They have the exclusive right of action under the statute and are entitled personally to the results of any judgment that may be recovered. This is a highly penal statute passed to protect widows and orphans from pecuniary distress resulting from the acts described in the statute, and to prevent the perpetration of such acts by awarding vindictive damages in addition to or regardless of the punishment which may be inflicted by the criminal law (25 Hun., N. Y. S. C., 627; 23 N. Y., 469). Wherefore, the judgment is reversed and cause remanded, with directions to sustain the demurrer and for further proper proceedings.

Alpheus Baker and M. Boland for appellant.

Byorn Bacon and Isaac Caldwell for appellee.

KENTUCKY CENTRAL RAILROAD CO. v. KENNEY.

(Filed May 31, 1884.)

1. Election of judge—Agreements—Although there is no law authorizing the choice of a special judge to act for a whole term in the absence of the regular incumbent, yet if parties agree that such judge may try their case, they can not afterwards object that his election as judge was invalid.
2. Covenants running with land—A parol agreement to maintain fences does not run with the land, but affects the parties to the agreement only. But a written agreement showing an intention to charge the land runs with it and is enforceable against subsequent grantees.
3. Action may be maintained against a railroad by proof of default in its obligation to keep a fence at a particular point by which plaintiff's cattle came on the track and were injured.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Hargis.

The Hon. W. A. Cunningham, in the absence of the circuit judge, was elected to hold the October term of the Bourbon Circuit Court. During the term this case was called, a jury waived, and, although he said he would prefer not to try the case and asked to be excused from acting, counsel for both

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plaintiff and defendant insisted that he should do so, which he did. After he had decided the case the appellant for the first time objected to him as a judge, on the ground that there was no law authorizing an election of a special judge for the term, and as he had not been elected to try this case and to act for that occasion the trial was illegal.

Section 1, article 7, chapter 28, General Statutes, provides, among other things, that "the parties by agreement may select one of the attorneys of the court to preside on the trial and hold the court for the occasion."

This the parties in the present case did, and the fact that the same attorney was acting as judge for the term, whether authorized by the letter of that section or not, makes no difference, for it did not affect or alter the right of the parties to select him by agreement to try the case. The question whether he was legally acting for the term is not necessarily before us. The deed for the right of way from appellee's vendor to the predecessor of the appellant stipulated that "said railroad company do make and keep in perpetuity good fences on each side of the roads, so far as the same run through and over my land." The evidence shows that the appellant owns the same road, rights and privileges as its predecessor, including the right of way conditionally granted by the deed, and that it has failed to make or keep in perpetuity good fences on each side of the right of way, and because it was not fenced the cow, the value of which was sued for in this action, strayed on the track and was struck and killed by the train. The introduction of the deed as evidence was objected to and the questions thus raised are whether the deed contains a covenant running with the land and did the failure to make or keep the fences contribute, in a proximate degree, to the negligent destruction of the cow. It is very clear that a parol agreement to maintain fences does not run with the land, but affects only the parties to the agreement.

It is equally certain, however, that a written agreement, such as this deed embraces, showing an intention to charge the land by the covenant, which in its very nature inheres in the land and contains mutual promises connected with the grant as a part of it, runs with the land and is enforceable by and

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against subsequent grantees. (Gill v. Atlantic and G. W. R. Co., 27 Ohio St., 240; Cook v. Mil. & St. P. R. Co., 36 Wis., 45; Bronson v. Coffin, 108 Mass., 175; Pierce on Railroads, 135, 424.)

On the latter point, Pierce on Railroads says: "If the company is in default in the performance of a legal obligation, as by neglect to maintain the fence at the place where the cattle came on the track, proof of such default and of the cattle coming upon the track at such a place will maintain the action, but such proof is essential" (Page 428). Numerous cases cited in note 2 to this extract fully and unequivocally sustain the principle it announces.

Wherefore, the judgment is affirmed.

O'Hara & Bryan for appellant.

Brent & McMillan for appellee.

MAIDEN v. COMMONWEALTH.

(Filed May 29, 1884.)

1. Practice—Instructions—It is error in a criminal case to submit special findings to the jury and instruct them; they must determine those facts to be true by a preponderance of evidence; they should be required to find the facts to be true beyond a reasonable doubt.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hines.

This is an indictment for breaking into and stealing from a certain storehouse. The conviction was for one year in the penitentiary. The main question is whether the court below instructed the jury.

The court first instructed the jury as to special findings, in which instructions the jury were requested to determine whether the facts submitted to them were established by a preponderance of the evidence—not as to whether the existence of the facts was established by evidence beyond the influence of a reasonable doubt. Upon these special requests the jury returned findings, and to one answered that the punishment should be confinement in the penitentiary for one year. The court also instructed the jury that they must find the accused guilty be-

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yond a reasonable doubt before returning a verdict of guilty. There was no general verdict by the jury, but upon the special findings the court pronounced judgment of confinement in the State penitentiary for one year. The instructions for special findings as presented are not authorized by the Code and are contrary to the theory of criminal jurisprudence. As in the case of a general finding the jury should be required to find every fact necessary to conviction to exist beyond the influence of a reasonable doubt. From the special findings by the jury, under instructions from the court, there can be no doubt that appellant was prejudiced, notwithstanding the general instructions referred to. They were authorized to find and must have found appellant guilty on a preponderance of the evidence, instead of a conviction of guilt established by evidence that excluded all reasonable doubt.

As the cause must be reversed for the error indicated, it is unnecessary to refer to the other points suggested by counsel as there is no probability that the errors, if any, will be repeated on a retrial.

Judgment reversed.

Walker & Hubbard for appellant.

P. W. Hardin for appellee.

CRITTENDEN v. COMMONWEALTH.

(Filed June 14, 1884.)

1. Evidence—A witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Hargis.

On the 13th of December, 1882, the appellant, Thomas Crittenden, was arrested and tried for a breach of the peace, the deceased, Rose Mosby, a colored boy about 19 years old, then employed as diningroom servant by appellant's father, being a witness against him. At the trial Mosby testified that Young, with whom appellant had the altercation, did not call the latter a white son of a bitch. Crittenden, therefore,

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said: "I will see you later," or "I will see you this evening." After the trial was over the parties separated and returned to their respective places, near Anchorage depot, Mosby stopping at the house of Ellen Barnett, a colored woman. Crittenden went to the depot, and there received an express package for his father, and carried it to his house, where Harry and Burnley, his brothers, were awaiting dinner. The diningroom was up stairs and the kitchen below.

Susan Johnson, who was introduced as a witness by the appellant, testified on direct examination that when he came back from Middletown (where the trial had taken place), he came in the kitchen "and asked for Rose—if he had come. I said no, and he asked me how long it would be before dinner, and I said as soon as Rose came. He went up stairs and came down and asked if Rose had come. Then he came back again and asked me if Rose had come. And then he said to have the dinner, that Harry would set the table." She said nothing about Crittenden being in a good humor or making any threats. On cross-examination she said: "When I was carrying the soup up I had on Rose's apron. I said Mr. Thomas came out of the room when I came up the steps. I did not know whether he was going to the diningroom or going out. He ran against me, and he said: 'Is that you, Rose?' and I said 'yes.' He said 'excuse me.' " She was then asked if, while the Crittendens were awaiting dinner, she did not go over "to Ellen Barnett's and take Rose Mosby out and tell him not to come back to Crittenden's; that he would be killed." She answered: "No, sir! I did not think he would be killed. I did not know." She was then asked: "Were you not when you went there in an alarmed and disturbed condition, and did not you go there to warn him not to come there?" Her answer was: "I don't know whether I was disturbed or not. After he said he was not coming, I just told him 'not to come.' " She was asked susbtantially the same questions as to an alleged conversation with Nichols, in which she was supposed to have related what passed between her and Rose Mosby at Ellen Barnett's. Her answer was: "I don't know whether I told Henry (Nichols) that or not." The Commonwealth, against appellant's objections, was

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then allowed to prove by Henry Nichols "that she said she told Rose not to come there; that Mr. Tommy was looking for him, and looked mad, and she thought he would be hurt; that Mr. Crittenden had come down twice to look for him. He came into the room where she was, looking for Rose, and he looked mad, and she got excited and ran to Mrs. Barnett's to tell him not to come there." And also by Ellen Barnett that "she said she had told Rose not to come down there; that Mr. Tommy would shoot him." This testimony was illegal because it was an effort substantially and in effect, as said by this court in Champ's case, 2 Met., 24, to show that the witness had stated out of court facts which she failed to prove in court, and thus to transform the hearsay testimony of Nichols and Barnett into substantive evidence which did not have the oath of Susan Johnson to support it, for she denied the occurrences as shaped by the questions put to her, and also swore that she had not had the alleged conversations which Nichols and Barnett, who knew nothing personally of the existence of the supposed facts.

Section 597, Civil Code, provides that "a witness may be impeached by the party against whom he is produced * * * by showing that he has made statements different from his present testimony." But the question here, on this point, is whether the alleged statements of Susan Johnson are different from her testimony. There is no necessary conflict between anything she said on the examination in chief and the statements attributed to her by Nichols and Barnett. If there be any conflict or difference it was drawn out by the cross-examination, and this should never be allowed for the sole purpose of contradicting the witness by statements made elsewhere. "A witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him" (Starkie on Ev., 200; Kennedy v. Commonwealth, 14 Bush, 357). Instead of differing from the tendency of her evidence, they rather accorded with it, and what she did do was simply not to testify to substantive facts which she was supposed to know. She failed to state in court facts which, it is said, she admitted out of court, and it was illegal to supply the omission by hearsay evidence.

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This view is clearly sustained by the authorities cited. There is another phase of this alleged contradictory evidence which renders it objectionable. It is this: Nichols was permitted to testify that she told him that she had told Mosby "she thought he would be hurt; that Mr. Crittenden had come down twice to look for him." Her inference from the facts as she stated them does not necessarily follow because Mosby was the diningroom boy, and by her testimony she shows that she was delaying dinner for Mosby to come and set the table, and that Crittenden finally said "to have the dinner; that Harry would set the table." It was for the jury to determine from the facts she detailed, and not from what she thought, whether Crittenden intended to kill Mosby or was impatient for his dinner, and certainly the appellant's acts and words and not her thoughts furnished the medium for ascertaining his motives and purposes. (Commonwealth v. Mooney, 110 Mass., 99; Kennedy's Case, 14 Bush, 358; 15 B. Monroe, 539.)

In the case of Loving v. Commonwealth, 4 Ky. Law. Rep., 460, the doctrine of the case of Kennedy and Camp is recognized and applied.

It is claimed by counsel for the Commonwealth that the evidence of Nichols and Ellen Barnett did not prejudice the substantial rights of appellant, first, because the appellant is clearly guilty; and, second, he was only convicted of manslaughter.

As to the first reason, it may be said that the court does not try the fact of the guilty or innocence of the prisoner. That is for the jury, and the jury alone; and all men are entitled to a fair and legal trial, and we know of no exceptions to this rule. It is true that the verdict of the jury finding the appellant guilty of manslaughter excludes the idea that they believe he did the killing maliciously, but it does not follow for that reason the appellant's substantial rights were not prejudiced by this evidence, for the question whether the killing was malicious was not the only issue in the case. The appellant's plea of not guilty controverted the malice necessary to constitute murder and presented the claim of self-defense, which, if true, entitled him to an acquittal of the homicide in any degree. It will not do, therefore, to say this evidence was not prejudicial, for that would be to assume that it had no bearing

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upon the plea of self-defense, which we can not concede. About the time Crittenden left the house, after he ate his dinner, Mosby came into the kitchen and began on the victuals, and when asked by Susan Johnson why he did not sit down and eat his dinner as he ought to, he said "that he had not time; that Mr. Thomas wanted to see him and he wanted to see Mr. Thomas," and then went out. Shortly afterwards at the depot Crittenden met him and said: "Are you going over to the house and wash the dishes." Mosby replied: "No; I don't think I will go there any more," and Crittenden said: "Very well," or "you won't? Very well," and went back to the house. Just after he left Mosby picked up a rock and put it in his pocket. Crittenden was at the house some minutes, got his gun, loaded it with bird shot, saying he was going hunting, there having been some black birds seen in the neighborhood shortly before that time. He passed out of the back way, and as he went toward the stable his brother says he told him to pay the expressage, which Crittenden said he had forgot, but would do so, and went on to the stable, where he staid some five minutes. Then he went to the west end of the depot, the route he took being much further than the usual way; got on the platform which led to the express office, and, according to the Commonwealth's witnesses, who were friendly to Mosby, walked down it until near to Mosby, presented his gun, said: "You son of a bitch, you swore a damn lie against me in court," and shot him in the left breast. Mosby turned and Crittenden shot him under and between the right shoulder and spinal column. Mosby staggered twenty or thirty feet and fell dead or died soon after his fall. Burnley Crittenden testified that he came in a few moments, took the gun from appellant and unloaded it. He said when he got there there was a large rock in Mosby's hand. The Commonwealth claimed that Mosby had only one rock and it was in his pocket, introducing several witnesses who testified that they saw no rock in or near Mosby's hand after he fell, and that none was on the platform. Whether Burnley Crittenden was to be believed was for the jury to decide. The theory of the defense is that Butler Nichols and Heath were members of a secret order to which Mosby belonged, and they were at or near the depot to sustain the latter in a contem-

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plated assault on Crittenden; that they were consequently hostile witnesses; that Mosby had armed himself with rocks and when Crittenden came up drew the larger rock to throw at the latter, and was shot in the act; that Mosby went to the house, after he had been at Barnett's, showing no fear of Crittenden but hurrying through eating, so he could find him, as he said he wished to see him, and that this evidence showed that the alleged statements of Susan Johnson, if made to him, had no influence on him, and could not have been as alarming as Nichols and Barnett would prove them to be by her conversations. It is plain, therefore, that there was evidence, if true, tending to establish self-defense, whose force we refrain from discussing, for its weight and credibility belongs to the triers of the fact, and the conversation with Susan Johnson, testified to by Nichols and Barnett, tended strongly to show that the alleged self-defense was a pretense, and the circumstances of loading the gun with bird shot, going the farthest way to the depot, and, as if on a hunt, stopping by to pay expressage, and the presence of the larger rock in Mosby's hand after he fell were false appearances in part and perjury as to the rest to excuse an otherwise willful murder. The alleged conversations of Susan Johnson, if believed, would naturally have impressed the jury that Crittenden was searching for Mosby in the kitchen every few minutes before dinner to kill him, and that his trips to the depot were for the same purpose, and tended to convince them that his plea of self-defense was a sham. It is not the duty of this court to speculate on the force of such important evidence and its weight with the jury, for it must have been prejudicial to his substantial rights. To do so would be to hazard a conflict of opinion between court and jury on the weight of illegal evidence, which, being sanctified by the court's admission as proof, may have had an important influence with the jury. (3 Bush, 352.)

The discussion of the facts has been indulged solely to show the importance of the error in admitting the evidence of Nichols and Ellen Barnett as to conversations with Susan Johnson, and not to indicate our belief as to the truth or falsehood of any of the evidence or theories on either side. Wherefore, the

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judgment is reversed and cause remanded, with directions to grant appellant a new trial.

Isaac Caldwell and P. B. Muir for appellant.

A. G. Caruth and P. W. Hardin for appellee.

LEEDS v. SHAW'S ADMINISTRATOR.

(Filed April 19, 1884.)

1. Charitable uses—A devise of income to be paid annually to the trustees of the L. school district for the education of poor children and maintenance of a good common school in said district is not void for uncertainty; nor does the failure to appoint an executor or trustee render the devise void.

2. The devise is for the benefit of white children alone, as no provision had been made by law at the date of the will for participation by colored children in the common school system.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Lewis.

The second clause of the will of John B. Shaw, deceased, which has been duly admitted to record, is as follows: "I then will and desire that my executor hereinafter named shall sell all my personal estate and collect all my debts, sell and convey my farm upon which I now live, containing about 90 acres, and any other real estate that I may own at my death, and invest the entire proceeds in United States bonds or other good interest paying stocks, and the interest arising from said investment is to be paid over every year to the trustees of the Lagrange school district, and by them expended in the education of poor children, or towards the maintainance of a good common school in said district in such way as said trustees shall think best—in order to do the most good to the poor children in said district. * I have not appointed an executor in this will, as I want to confer with some of my friends to see whether they will act, and if I do not hereafter appoint an executor, then I want the county court to appoint some good man who will see this will carried out."

An administrator with the will annexed, appointed by the Oldham County Court, brought this action to settle the estate of the testator, for construction of the will, and judgment deter-

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mining in what stocks the surplus of the estate, after payment of debts, shall be invested, and to whom the annual interest of such investment shall be paid.

To the action E. S. Leeds and others, heirs at law of the testator, D. H. French and others, trustees of the Common School District of Lagrange, and Boston Baldock and others, trustees of the Lagrange Colored School District, were made defendants.

The lower court having rendered judgment determining that Leeds and others are not entitled as heirs at law to any part of the estate of the testator, and sustained a general demurrer to the answer of Baldock and his associates, they have respectively appealed; the first named upon the ground that the clause of the will quoted is void for want of certainty, and the latter claiming to be entitled for the benefit of the colored children of the school district to a pro rata share of the annual interest arising from the fund set apart by the testator.

In our opinion there is no such want of certainty as to either the nature and objects of the testator's bounty, or as to the persons appointed, or their capacity to execute the trust as renders the will invalid or ineffectual.

The executor of the will or, there being none, the administrator appointed by the county court of Oldham county, where the testator resided at the time of his death, is empowered to collect the proceeds of the estate devised for the purpose mentioned, and invest them in safe stocks, the interest of which is to be annually paid to the trustees of the Lagrange school district, who are by law constituted a corporation, with authority to expend and use the money in the manner and for the purposes mentioned in the will.

But even if there was no person appointed by the will in whom the title may vest, by section 2, chapter 13, General Statutes, authority is expressly conferred upon the court of equity for Oldham county to uphold the charity by appointing a trustee, or by taking control of the fund or property, and directing its management and settling who are the beneficiaries thereof.

As held by this court in Cromie's Heirs v. Louisville Orphans' Home Society, 3 Bush, 365, the aim of chapter 13 is to

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make such charities as it enumerates available whenever so defined as to be judicially identified and applied.

That the bounty provided by the testator in the clause of his will quoted is within the purview of the statute and may be judicially identified and applied is too manifest to need argument. There can be no reasonable doubt but that the beneficiaries of the charity intended by the testator are children residing within the common school district in which the town of Lagrange is situated, and who are by law entitled to the benefits of the common school system of the State.

We also think it clear that the testator intended the annual interest on the fund to be paid to the "trustees of the Lagrange school district," established according to law for the education of white children, and to be expended for their benefit alone. At the date of the will, which was in 1873, no provision of law existed for the participation of colored children, in the benefits of the common school system of the State, nor was there any common school districts then established for their benefit. By the act of 1874 first authorizing the establishment of common school districts for the benefit of colored children as well as by the law as it now exists, they are required to be separate and distinct from districts provided for white children. So that there are now two distinct common school districts in which the town of Lagrange is situated, one being for the education of the white, and the other of the colored children. But the testator makes provision for the payment of the annual interest to the trustees of only one school district, to be by them expended for the benefit of only one class of beneficiaries. To construe the will so as to extend the charity to colored children would require the payment of the annual interest to be made to two distinct sets of trustees for the benefit of two distinct classes of beneficiaries, when from the language used in the will it is obvious the testator contemplated only one set of trustees and one class of beneficiaries, to wit, the white children of the common school district as it existed when the will was made.

Wherefore, the judgment is affirmed on the appeal of Leeds and others, claiming to be the heirs at law of the testator, and of Baldock and his associate trustees.

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Rodman & Brown for appellants.

Robbins & McIntyre, French & Howard and Carroll & Clore for appellee.

O'DELL v. LITTLE.

(Filed May 31, 1884.)

1. Estoppel—A and B exchanged lands, but A's husband failed to join in the deed to the tract conveyed by her, Held—She is estopped to recover it on this ground, she having in the meantime disposed of what she had received from B.

2. Statute of limitation—Time defined in which wife must sue to recover lands defectively conveyed by herself and husband.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

John O. Cochran at his death left surviving him his two daughters, Mrs. O'Dell, the appellant in this case, and Mrs. Eliza Little, the appellee, the husband of Mrs. Little being a party to the appeal. The real estate of the daughters was allotted to them and conveyances made by which each was invested with title to her portion of the inheritance. After this was done they exchanged their respective parcels, the one for the other. Mrs. Little and her husband conveyed to Mrs. O'Dell, and the latter conveyed to Mrs. Little.

After the conveyance to Mrs. O'Dell she and her husband sold the lot in Louisville conveyed to them by Little and wife, and invested the proceeds in other property. The conveyance evidencing the exchange between the two sisters was made in the year 1862, and at that time Mrs. O'Dell's husband was living, but failed to unite with her in the conveyance. He was no party to the deed except his signature under that of the wife, and his acknowledgment afterwards made in confession with the wife before the clerk.

When the conveyances were made in 1862 Mrs. Little and husband took possession of their lot, and have been in the possession since that time. In 1873 the husband of Mrs. O'Dell died and she was then discovert, and in 1881 instituted this action of ejectment against her sister, Mrs. Little, for the recovery of the lot conveyed to the latter upon the ground that

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her husband not uniting with her in the conveyance, it was absolutely void.

The appellees, Little and wife, filed an answer, relying, first on the statute of limitation; second that the appellee, Mrs. O'Dell, having been invested with title and having disposed of the lot conveyed her by her sister, is estopped by such acts from recovering the lot in controversy.

We can not well see how the plea of the statute of limitation is to be avoided by the appellant if the theory of the appellee is to prevail. The entry on the land was not then under the title of feme covert, and it is urged that no title passed from the husband, and the appllees are to be regarded as going upon the land under a claim of right hostile to the appellant's and all other claimants. They were on the land from 1862 until 1881, a period of near nineteen years, and eight years after the disability of coverture had been removed. The contract or conveyance being void the right of entry on the part of the husband and wife accrued in 1862. The statute provides "that an action for the recovery of real property can only be brought within fifteen years after the cause of action first accrued to the plaintiff," and further, that "if at the time the right of any person to bring an action for real property first accrued such person was an infant, married woman, or of unsound mind, then such person or the person claiming through him may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed." (Sections 1 and 2 of article 1, chapter 71, General Statutes.)

There was no life estate or curtesy sold by the husband that would prevent the statute from running, but an entry under a conveyance that appellant claims did not pass the title. Whether it did or not under our statute is involved in doubt, but we think it is manifest that the entry was under Mrs. O'Dell, and if the title is defective the statute began to run at once, and the feme is only protected by the saving of three years embodied in section 2 of article 1 of chapter 71, General Statutes.

In Stephens v. McCormick, 5 Bush, 181, this court held that where the husband sold the wife's inheritance passing to her, in the year 1837, that she was not barred or the statute did not

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begin to run until the limitation of the life estate of the husband, as she could not sue and had no right of entry until that event happened, and further said that if she had united with the husband in the deed and claimed that it was defective, that she must then sue within three years after the removal of her disability.

This is a much stronger case, as there was no impediment on the part of the husband and wife, and the entry was under the wife, with the claim of an absolute title against both, and, therefore, the action must have been brought within three years after the husband's death, and, if not, and the fifteen years has run, excluding the three years, the saving clause of the statute, the limitation is a complete bar to the recovery.

If this position is not tenable (but as to the correctness of the ruling we have no doubt) how is the appellant to escape the equitable defense relied on by the appellee? She has obtained her sister's land by an absolute conveyance—has passed this sister's inheritance by a conveyance to other parties, receiving herself the consideration, and is now asking her sister, the appellee, to surrender the land conveyed to her by the appellant for the reason that her conveyance is void.

By the exchange of lands she makes herself the sole heir or obtains the entire inheritance to the exclusion of the appellee, if a recovery is permitted in this case. She becomes invested with title to the whole, and, having disposed of the one-half, seeks to recover the other. It does not follow that because the deed or contract of a married woman is void, that in a court of equity she must be restored to her original condition, regardless of the injury it inflicts on others. When she became invested with title to her sister's land she must have known, or will be presumed to have known, that she could not divest her sister of title by disposing of what she obtained from her to a stranger, and again divest that sister of what she attempted to convey to her in consideration for it on the ground that the conveyance was void. Her disability will not relieve her from her fraud or enable her by such conduct to inflict such a wrong on her sister.

This court, in two cases reported in 3 Bush, has adjudged that a feme covert may be estopped by her own conduct,

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although incompetent to contract (Craddock v. Tyler, 3 Bush, 360; Connolly v. Branstler, 3 Bush, 702). Before the appellant could recover she should be required to restore the property or its equivalent sum, if the statute of limitation was not relied on, so in either view of the case the judgment must be affirmed.

Baker & Toney for appellant.

Goodloe & Roberts and Alex. P. Humphrey for appellee.

CUMMINS v. COMMONWEALTH.

(Filed December 8, 1883.)

1. The evidence in this case is held sufficient to show the parties guilty as co-conspirators, and they are, therefore, disqualified to testify in behalf of each other.
2. The evidence did not authorize an instruction based on voluntary manslaughter.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Pryor.

We have seldom read a record where a conviction has been had with fewer mitigating circumstances than the one before us. The parties entered the residence of the deceased, where his friends and neighbors were enjoying his hospitality, and without the slightest provocation the appellant began to flourish his knife and make other demonstrations, evincing his intention to take possession and end the pleasures of the young people, who, by invitation, had gone to the house of the deceased. All but the accused and his company were there because the deceased wanted them, and it may be that the accused and his friends were provoked at not being invited. They went into the unfortunate man's house in a drunken condition, and evidently with the design of breaking up the party. Pistols and knives were in their possession and all of them ready to use them upon the slightest interference with their designs. The deceased saw their condition and was standing in the door of his room after Smith had been ejected, entreating them to behave and return to the room and participate in the enjoyment, and while extending his hospitality in this manner, after such cruel treatment, the crack of the pistol is heard and Myers falls dead in the arms of his wife.

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There is no palliation or excuse for the murder, and whether Cummins shot or Weaver is immaterial, they were equally guilty. The proof conduces to show that Cummins fired the pistol, and this is strongly corroborated from the fact that he entered the room with knife in hand, having then a murderous intent without the slightest excuse. He was the leader of the gang, and while Weaver hung himself next day, declaring beforehand that he fired the shot, still the proof conduces to show that the accused was the guilty party. The question of fact was with the jury, and what Weaver said about it was properly excluded. The co-conspirators were offered as witnesses to prove that there was no conspiracy, and that Weaver shot. The proof that they were together and united in breaking up the party and taking this man's life is conclusive, and the court properly excluded their testimony.

Smith, one of the conspirators, as soon as he reached the house of Myers, took McElfresh to one side and told him that he was going to raise hell there. Cummins, the accused, then came up, yelling and cursing, jumped into the house, with a knife in his hand, saying hands off, or he would cut hell out of the first man that laid hands on him. Snodgrass was standing at the door cursing. These are the parties who were proposed to be introduced as witnesses for the defense, and who are jointly indicted with the accused, it being alleged in the indictment that they conspired to take the life of the deceased.

There are other facts showing a purpose on the part of these parties to invade the house of the deceased and assume control of the party, and whether the proper avowal has or not been made as to what the parties would prove, the facts of the record present such a state of case as authorized the court to exclude them as witnesses. Smith and Snodgrass were both at the door when deceased was shot. They were then being invited in by Myers, he telling them that he was their friend, but instead of coming in they would push first one and then the other into the door, and in this drunken condition took this man's life in the door of his own house and in the presence of his family, without excuse, justification or provocation, and in the midst of the poor man's entreaties to behave themselves

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and enjoy, if they desired, the hospitality of his humble home. There is nothing in the case authorizing an instruction based on voluntary manslaughter.

The judgment below is affirmed.

R. K. Smith for appellant.

P. W. Hardin for appellee.

SNAPP v. COMMONWEALTH.

(Filed June 14, 1884.)

1. Larceny—Rightful possession—A city tax collector having employed accused as his clerk to collect taxes due the city, and the latter having collected taxes which he failed to pay over, Held—That he was civilly liable only and not criminally for larceny, since the money had come rightfully into his possession. Where one comes lawfully into possession he does not become guilty of larceny by subsequently converting property to his own use.

2. Evidence—Distinct offenses—The general character of the accused, his disposition to commit crime, are not ordinarily admissible evidence; nor on the trial of an indictment for larceny is evidence admissible that accused committed another larceny about the same time or a series of such offenses. But in some cases where the question of scienter or intent is raised, evidence of other offenses similar to the one charged is admissible.

3. Evidence—Nor is evidence admissible in such case of extravagant habits of the accused or of the fact that he spent at a time prior to the larceny charged sums exceeding his salary.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The grand jury at the April term, 1883, of the Jefferson Circuit Court, returned an indictment against the appellant, Cope J. Snapp, containing two counts, one for embezzlement and the other for grand larceny. He was convicted of grand larceny and has appealed to this court. It was alleged in the one count that while acting as clerk for one David Ferguson, back tax collector of the city of Louisville, he had embezzled $342.88 of money belonging to the city, and in the other that he had feloniously taken and converted to his own use the same amount and the same sum of money, and was, therefore, guilty of grand larceny. The money said to have been the subject of the larceny was paid to the appellant by Clemerson in a check on one of the Louisville banks in discharge of taxes due by

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one Newman. The prosecution and the defense both established the fact that Ferguson was the back tax collector for the city from the month of April, 1881, to December, 1882, and it is a fact conceded that during that period he was a defaulter to the city on account of moneys collected in a sum largely exceeding $50,000. He was indicted for embezzlement, tried and convicted of the offense and finally released from prison by executive interference. The appellant, Snapp, was the chief clerk and cashier of Ferguson, and, from the testimony, seems to have had almost the entire control of the office and the moneys collected. Ferguson received for his services a commission on the amount collected and employed Snapp (the accused) as his private clerk out of his own means, paying him for his services $75 per month. Under the law defining his duties as back tax collector Ferguson was required to settle his accounts with the city treasurer, and pay over the money collected by him at the end of each week, but this he neglected to do, and settled once in two or three weeks. The reports to the treasurer evidencing the amount of money collected by him were usually, perhaps always, made out in the handwriting of the accused and signed by Ferguson. There was in the office of Ferguson two books, called the ledger and cash book. In the one was inserted the names of those owing back taxes, and the amount, also the amount paid by them; and in the other was the amount of cash received at various times from those paying it. When money was paid tickets were made and placed with the cash in the cash drawer and the money usually taken from the drawer and deposited in some one of the banks to Ferguson's credit. The safe in which the books were kept, and sometimes the money, as well as the office, was furnished by the city. The appellant seems to have made the deposits generally, and the money when required by Ferguson was checked out on his order, to be paid either to the city treasurer or to those entitled. Ferguson was at the Hot Springs from May 20, 1882, until the 10th of June of the same year, and during his absence it appears that one Newman was indebted to the city for taxes on his property for the years 1878, 1879, 1880 and 1881. For the last two years the money was going to

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the tax receiver of the city, and not to the back tax collector. The entire amount of taxes due was paid by one Clemerson in a single check, and this check delivered to the appellant, Snapp, who indorsed it and then delivered it to the clerk of the tax receiver. The bank where it was payable cashed the check and the tax receiver or his clerk retained the amount due him and paid the balance to the appellant, that balance, $342.88, belonging to the back tax collector's office. All of this sum Snapp is proven to have accounted for except $169.45, the amount of Newman's taxes for the year 1879. This sum was not entered on the cash book or accounted for by Ferguson in his settlement with the city treasurer after his return home, nor has the city, so far as this record shows, ever received it. The same day Snapp received this money ($342) he deposited in bank to Ferguson's credit $550, and claims to have accounted to Ferguson for all this money received by him. There was a plea of not guilty entered, and the burden was on the Commonwealth to show a felonious taking of this money and its conversion by the accused before he could be convicted of larceny. The failure of either to account to the city for the money did not make either guilty of larceny. Ferguson's duty was to account to the city treasurer, and Snapp's duty was to account to his principal, Ferguson, and while the failure to account showed the one or the other or both to have been in default, still it made neither guilty of a felonious taking of the money belonging to the city.

The prosecution was permitted to prove, in order to a conviction, that, during the absence of Ferguson in the South, there had been paid into the office of the back tax collector at various times (the accused being in charge of it) the sum of $6,900, and that nearly $2,000 of that sum had never reached the city treasury or been accounted for by Ferguson. The appellant objected to the introduction of this testimony, and his objections were overruled, to which an exception was entered.

The prosecution, after issue formed between the accused and the State, undertook to convict the appellant of larceny in taking the $342, amount paid him of Clemerson's check in discharge of numeorus tax bills, and the testimony was directed

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to that specific charge. The issue was then distinctly made, and it devolved upon the Commonwealth to show an unlawful taking of this money from the city by the accused with a felonious intent.

Snapp was not an officer of the city, and was under no obligation to account to the city treasurer, nor would the latter have recognized him as the party with whom he was to make these weekly settlements. It was Snapp's duty to account to Ferguson and to no one else. The Commonwealth had traced the money into the hands of the accused, who had the right to collect it and pay it over under Ferguson's order. The money was properly paid over to him, and he alone, during Ferguson's absence, had the right to its custody. A conviction could not be had under the indictment for larceny unless the jury believed from the testimony that the accused had taken this particular money, or a part of it, from the city of Louisville with the felonious intent of depriving the city of its use. The money had been received without fraud and as a matter of right, and in such a case, although he may have had the animus furandi afterward and converted it to his own use, he is not guilty of larceny. There is no testimony in the case showing any felonious taking after this money had been lawfully received by the accused unless the jury may infer a subsequent felonious taking from the previous conduct and history of the accused. The presumption in favor of the accused is that he accounted to Ferguson for this money, and this presumption of innocence continues until facts establishing guilt appear, and when a failure to account is shown it does not constitute larceny. If this money had been deposited with the city treasurer and then abstracted by the accused he would be guilty of larceny, or, if paid over to Ferguson and by him deposited in the safe in his office by the appellant as his clerk, and the latter had then taken it with a felonious intent, he would be guilty of the offense of larceny from Ferguson, but not from the city. Neither state of the case is presented by the facts of this record, and the jury were permitted to infer the commission of the offense from testimony introduced by the prosecution showing that other sums of money had been unaccounted for by Ferguson that had been collected by Snapp in Ferguson's ab-

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sence, and, although the accused came into the possession of the money lawfully, there was a subsequent felonious taking that constituted the offense of larceny. The corpus delicti had not been established, but the jury were in effect told, or were permitted by the introduction of this testimony to convict the accused of the larceny of $169, not because the offense had been proved, but for the reason that during a period of two months his principal (not the accused) had failed to account to the city of Louisville for nearly $10,000.

Where several felonies are parts of the same transaction evidence of all is admissible in the trial of an indictment for any of them. (Russell on Crimes, volume 3, page 283.)

This rule, however, does not apply to a case like this, where a charge of larceny alleged to have been committed on one day is attempted to be established by proof of another larceny committed on a different day, although from the same party and under the same employment. Three indictments were pending against the same party for setting fire to three ricks belonging to three different persons. It appears that the ricks were in sight of each other, and were set on fire the one after the other. It was held that the whole was one continued transaction. Or in an indictment for arson, containing five counts for setting fire to five different houses which were all in one row, and the fire from the one communicated to all the others, it was held to be one transaction. In this case testimony has been introduced of independent and distinct transactions, or appropriations of money, for the purpose of showing that a lawful possession has become tortious. Such a ruling can not be sustained upon principle or authority.

"The facts proven must be strictly relevant," says Russell, "to the particular charge, and have no reference to any conduct of the prisoner unconnected with the charge." For this reason the general character of the accused, his disposition to commit crime, can not be introduced by the prosecution for the purposes of a conviction, and, if not, we see no reason why, on a trial for larceny, where the felonious taking is denied, that fact may be established by proof that the accused committed another larceny about the same time, or a series of such offenses similar in their character. When it becomes necessary to show guilty knowledge, or the intent with which the

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act was done, such evidence is admissible. In an indictment for murder former threats between the parties may be shown to establish malice, or where one is charged with making a fraudulent entry the fact of the entry alone is not sufficient evidence of fraud, and, therefore, the intent must be shown by the Commonwealth; and it is important to show other false entries, with a view of showing the intent with which the false entry was made. One is charged with passing a counterfeit bill, knowing it to be counterfeit; the scienter may be established by showing the passing of similar bills and his knowledge that they were counterfeit. So in an indictment for poisoning proof may be introduced showing that the accused knew it was poison and its effect by having administered the same drug to others. An attempt to obtain money under false pretense, by pledging worthless property as valuable, representing that a brass ring is gold. The fact of attempting to pass and disposing of such spurious jewelry to others may be shown to establish the intent or knowledge of the party. "It may be laid down as a general principle," says the learned judge below, "supported by reason and authority, that where there is a question whether an act was accidental or intentional, the fact that such act formed a part of similar occurrences in each of which the person doing the act was concerned, is deemed relevant." Such evidence is admitted for the reason that the intent or scienter can not be established without it, but the rule has never been carried so far as to admit evidence against the accused of an independent larceny, although of the same character, for the purpose of convicting the party of the larceny for which he is being tried. Besides, what does this evidence establish, if competent? It shows that Ferguson failed to account to the city for various sums of money while Snapp was his clerk, and some of it or all of it collected by Snapp when Ferguson was absent. This is no evidence of a felonious taking by Snapp when the only evidence introduced against him establishing the corpus is that he received the money lawfully. It may be and is evidence inducing to show that one or the other, Ferguson or Snapp, appropriated the money to their own use, but it is not evidence of a subsequent felonious taking of $342 that makes Snapp guilty of larceny. The corpus de-

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licti in this case was not established by the proof that he obtained the money lawfully, because, having obtained it rightfully, if he had expended it the next moment he is not guilty of larceny. It is no case for proof as to the unlawful intent, for, when established, conceding that he appropriated it to his own use, he is civilly and not criminally responsible. This proof has gone to the jury not only to show that he intended to dispose of it for his own use when he received it, but, in addition, to show a subsequent felonious taking. In an indictment for stealing pork, a bowl, some knives and a loaf of bread, it appears that the accused entered a shop and ran away with the pork, and in a few minutes returned and placed the pork in a bowl which contained the knives, and took away the whole together, and in half an hour returned and took the bread. It was held that taking the bread was a distinct offense, and could not be given in evidence under the indictment. "Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together and form part of the entire transaction the one is evidence to show the character of the other" (Russell on Crimes, page 280). In this case the failure of Ferguson to account for the moneys paid to Snapp at various times while he was absent, although not shown to be larceny by Snapp or Ferguson, is permitted to go to the jury to establish that a failure to account in a single instance does constitute larceny, or is a fact from which the jury may infer the commission of the particular crime. In the case of the State v. Goetz and Martin, 34 Mo., the defendants were indicted for larceny of jewelry from the store of Jaccard in St. Louis. The defense was that the property was taken by their children unknown to them, and that they were of good character. The State then introduced evidence that on the same day and about the same hour the defendants had stolen articles from the stores of others in the vicinity of Jaccard's store. The evidence was held incompetent, the court saying: "We have been unable to find any reported case in which, upon a trial for larceny, evidence of another and distinct larceny was admitted to establish the one charged in the indictment." If there was a taking of this

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money from the city without right or authority, no evidence on the part of the Commonwealth of the intent was necessary. If the accused took from the possession of the city or Ferguson the money of either and appropriated it to his own use the law will imply the intent. If he did what is charged the criminal intent necessary to constitute the offense accompanied the act. Such an act would be neither innocent nor lawful, but unlawful, and the burden would rest on the accused to excuse himself from the criminal intent that necessarily arises from the commission of such an act. Lord Mansfield says: "When an act in itself indifferent becomes criminal if done with a particular intent, then the intent must be proved and found, but when the act is unlawful the proof of justification and excuse lies with the defendant, and in case of failure thereof the law implies criminal intent."

The testimony objected to being incompetent, the objections should have been sustained.

It further appears from the indictment and the testimony in support of it that this alleged larceny was committed on the 8th of June, 1882, and the prosecution was permitted to prove that before the larceny is alleged to have been committed the accused was of extravagant habits, his mode of living, the expenditure of a much larger sum of money each month or year than his monthly or yearly salary, all facts transpiring before the commission of the offense. All this was allowed to show the inducement for the wrongful appropriation of the money. This was clearly incompetent. His habits and mode of life prior to the 8th of June, 1882, had no connection with the commission of the offense with which he stood charged. Such evidence would doubtless be competent in a case where a party indicted for robbery from the person, or larceny of money or goods, to prove that immediately after the offense the party accused, prior to that time being without money, had in his possession shortly after large sums of money, and was using it lavishly on himself or family, such a link in the chain of circumstances might be properly introduced, but his extravagant habits prior to the time of the commission of the offense it seems to us can not be admitted under any recognized rule of

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evidence, and, therefore, the court erred in permitting it to go to the jury.

After the testimony had been heard on both sides counsel for the appellant asked the court to say to the jury that, if the accused had accounted to Ferguson for the money, they should acquit him. If a conviction could have been had on the theory of the prosecution this instruction in a modified form should have been given. The accused was under no obligation to account to the city, but was compelled to account to Ferguson. If, therefore, he in good faith accounted to Ferguson he was entitled to an acquittal.

There was proof conducing to show that he had accounted for all the money received by him during Ferguson's absence but $500 or $600, and the jury might well have concluded that in making the account he had included the amount collected of Newman. While Ferguson was collecting this money as a public officer for the use of the city the city was not entitled to the identical money. He had the right to deposit it wherever he saw proper or to retain it in his own custody, and all the city had the right to demand of Ferguson was to pay over the amount collected by him, and Ferguson had the right to exact an account from his clerk, and it was his duty to make it and to pay to Ferguson the money he, as clerk, had collected. If the money had been taken from the drawer in Ferguson's office or the safe it was a theft from Ferguson, and the latter was liable to the city on his bond for the loss. This was not the final depository of the city's money, kept by its agent or treasurer in the vaults of the city, and who is responsible for that diligence that a prudent and careful custodian of its money should exercise, and if the burglar should enter and take the money the city must bear the loss, and not the treasurer, when not lost by his neglect. Ferguson was only a tax collector, and no distinction exists between him in this regard and the sheriff or his deputy, who collects the county levy and the State revenue. It will not be argued that a sheriff may be indicted for larceny from the State or county when he fails to account for the revenue collected by him, and, when collected, if stolen from his possession or from the safe in his office, whether furnished or not by the county or State, he is liable

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for the loss. The thief steals from the sheriff and not from the State or county, and even if the accused was guilty of larceny, it was a taking from Ferguson and not from the city. Ferguson could not be guilty of larceny by taking the money, and, having the right to its custody, an accounting to him by the accused entitled the latter to an acquittal. Under 24 and 25 Victoria it was provided: "Whoever, being the bailee of any chattel, money or valuable security, shall fraudulently convert the same to his own use, shall be guilty of larceny," etc. Under this statute the prisoner was indicted, charged as bailee with stealing the money in his custody belonging to a society. Miles, Justice, said: "The prisoner is charged with larceny as bailee, but he was the acting treasurer, and as such it was his duty to deposit or invest the money received, and he was not required to pay over the specific coin that came into his hands, which is essential to a bailment" (2 Russell on Crimes, page 274). This case is cited to show that Ferguson was not a mere bailee and required to pay over the identical money received by him from the taxpayer, and, therefore, a felonious taking of the money from him or his office is a theft from Ferguson.

In this State we find various statutes enacted with reference to officers of corporations who are intrusted with the custody of the funds of the corporation making them criminally liable for the dispensing of such funds for their own use. Also enactments making any one guilty of embezzlement who fraudulently misapplies funds belonging to or for the use of the State, county, etc. Whether the case of a tax collector comes within the provisions of any of these statutes is not necessary to be determined, but it is manifest they were enacted so as to punish those who otherwise, under the rule of the common law, would only be guilty of a breach of the trust in using such moneys when under their care and control.

The jury were the triers of the fact as to the guilt of the accused, but, having returned a verdict based on incompetent testimony, it is the duty of this court to reverse the judgment of conviction. The accused has been convicted of larceny when the money alleged to have been wrongfully appropriated came rightfully into his possession, and when the evidence is ex-

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cluded that has no relevancy to the issue made, there is no case of larceny against him.

Judgment reversed and cause remanded for proceedings consistent with the opinion.

Young & Trabue, P. B. Muir and Henry Clay for appellant.
A. G. Caruth and P. W. Hardin for appellee.

RECENT LEGAL LITERATURE.

American Probate Reports, containing recent cases of general value decided in the courts of the several States on points of Probate Law, with notes and references. By Wm. Ladd, jr. Vol. III, pp. 623. Baker, Voorhis & Co., New York, 1884.

This is one of the most interesting collection of cases that we have seen in any volume. The subject is an important one and the cases are well chosen so as to bring out the main principles. There are two cases selected from recent reports in this State: Flood v. Pragoff, 79 Ky., 607, and Toebee v. Willaims, 80 Ky., 661. In the preparation of the notes the editor acknowledges himself indebted to Mr. Chas. F. Beach, of the Louisville bar, for very material assistance.

A Treatise on the Law of Private Corporations having Capital Stock. By Henry O. Taylor, of New York Bar. Kay & Bro., Philadelphia, 1884; pp. 714.

The object of this treatise is to give an accurate statement of the law regulating business enterprises which are prosecuted through the instrumentality of corporate organization. The work is well done and is on a subject of growing importance.

A Treatise on the Law of the Statute of Frauds and of other like enactments in force in the U. S. and England. By Henry Reed, of the Philadelphia Bar. 3 volumes, Kay & Bro., Philadelphia, 1884.

With the reports already numbering 5,500 and increasing at the rate of 100 annually, the needs of the practitioner have

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called into existence the modern text book. It chooses a particular branch of a particular subject and aims to collect all the reported cases thereon. This volume is one of the best of its kind, and, as its subject indicates, is necessary to every busy practitioner.

The lines on the dedicatory page are very graceful:

Non tibi, eheu!
Said carae memoriae tuae

A Treatise on the law of Warranties in the sale of Chattels. By Arthur Biddle. Kay & Bro., Philadelphia, 1884, pp. 304.

In all works on sales of personal property this subject is necessarily treated, but, being only collateral to the main one, it is restricted to a statement of the most general principles. This volume aims to treat it at length, and with that fullness of detail which it deserves. The subject is an important one, and the work can not fail to be of use to the lawyer with a case on this subject.

The American Law of Taxation, as determined in the Courts of Last Resort in the U. S. By Robert Desty, 2 volumes. West Publishing Co., 1884, pp. 739.

This work is by a well-known law writer, and is in the same form as other volumes on different subjects already issued by him. He aims to make a digest. This is all the modern law book can accomplish. His works already issued are the best we know of, and this seems to be of a kind with them. It embraces 10,000 cases.

NOTES.

A farmer who had never indulged in the luxury of a law suit, found himself compelled to visit a lawyer. He opened the conversation by saying: "I am a plain farmer, and have dealt with none but honest men all my life, so I hardly know how to address a lawyer."—Ex.

Sir James Scarlett, when at the bar, had to cross-examine a witness whose evidence it was thought would be very damaging

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unless he could be bothered a little, and his only vulnerable point was said to be his self-esteem. The witness presented himself in a box—a portly, over-dressed person, and Scarlett took him in hand.

"Mr. Jno. Tompkins, I believe?"

"Yes." "You are a stock broker?" "I ham." Scarlett regarded him attentively for a few moments, and then said: "And a very fine, well-dressed ham you are sir!" The shouts of laughter which followed completely disconcerted the witness, and counsel's point was gained.

It is said of Lord Brougham that in whatever company he was he betrayed a resolution to make himself prominent and to be talked of, which pleased him nearly as much as unmixed admiration. He was elected speaker of a debating society in his younger days, but the club met with an early dissolution because the speaker engrossed the entire conversation to himself. He debated every question, determined every point of order, answered every speech, whether directed against his own or not, and finally decided every question under debate.

It is said of Lord Lyndhurst that when he was Master of the Rolls he got on by sitting as seldom as possible, rising as early as possible, and doing as little as possible.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters, with brief references to the foregoing Cases reported in full, making an Index to the whole number.

Advancements—

1. A father made advancements by deed to all his children, reserving to himself the use of the lands conveyed during his natural life, and providing that upon his death the portion conveyed to each child should be appraised, and those of the grantees "receiving more than an equal part to pay to those not receiving so much as much as will make them equal." The grantor by his will, subsequently executed, directed an equal division of his property among his children, and provided that no gift of money or property to any of his children should be charged as an advancement.

   Held—That the testator intended by his will to direct an equal division of only such property as he might own at his death, and could not have had reference to the property previously conveyed to his children, which they took under the deed upon the terms and conditions specified therein, and neither the property so conveyed nor the money required by the deed to be paid to equalize the grantees can be charged as advancements. Palmer's Ex'or v. Turner, &c. June 5, 1884. Bourbon Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev., Lewis, J., dissenting. Chas. Offutt for appellant; Brent & McMillan for appellees.

Criminal Law—See Evidence, 1, 2—

1. Homicide—Surgical operation—Where a wound is calculated to produce death and a surgical operation is performed at the instance of competent physicians, when in their opinion it becomes necessary and the patient dies, the party inflicting the wound is responsible criminally for the act, although the operation may have been the immediate cause of the death.
2. Instruction as to self-defense—The court erred in this case in failing to give an instruction as to self-defense, to which the defendant was entitled under the proof, and for that error the judgment is reversed. Osborn v. Commonwealth. June 7, 1884. Menifee Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Tom Turner & Son and A. T. Wood for appellant; P. W. Hardin for appellee.

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Devises—

1. Death of devisee before testator—Indebtedness to estate—A testator, after making specific devises of real estate to his children by his will, directed an equal division of his personalty among his three children. A codicil made after the death of one of the devisees provided that his children should take the same interest their father would have taken.

Held—That the children of the deceased devisee, taking under the will, occupy no better attitude than their father would have occupied, and in the distribution of the personalty should be charged with the indebtedness of their father to the estate. Hummer, Gd'n v. Orndorff's Ex'or. June 3, 1884. Logan Cir. Ct. Opin. by Hines, J., Ct. Ap., aff. W. F. Browder and Geo. B. Edwards for appellant; A. G. Rhea for appellee.

Dogs—See Master and Servant, 1.

Evidence—See Pleading, etc., in Crim. Cases, 7, 8, 9—

1. Manslaughter—While it was competent to show upon the trial of appellant for manslaughter that the difficulty was avoided instead of being sought by him, the court properly refused to allow a witness to say what he thought as to the movements of the deceased just before the latter and appellant met at the moment the killing occurred, as his thoughts were not communicated to appellant and could not have influenced his movements.
2. It was not improper to allow the Commonwealth to show that the person of the deceased was examined while he was asleep just before the killing, and just after a difficulty between him and appellant, and that he had no deadly weapon. Mays v. Commonwealth. June 19, 1884. Whitley Cir. Ct. Opinion by Lewis, J., Ct. Ap., aff. S. Golden and James D. Black for appellant; P. W. Hardin for appellee.

Experts—See Pleading, etc., in Crim. Cases, 5.

Frauds, Statute of—

1. Parol contract for right of way—The mere evidence of a parol contract giving a right of way over land will not authorize its enforcement, and where there is no consideration for such a contract equity does not require that the owner of the land, upon revoking the grant, should restore to the party claiming the easement the amount expended by him in erecting fences and gates for his own convenience. Goodwin v. Crider. June 5, 1884. Oldham Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. Lindsay, Rodman & Brown, Carroll & Barbour and Joseph Clore for appellant; Robbins & McIntyre and J. S. Morris for appellee.

Instruction—See Pleading, etc., in Crim. Cases, 2, 3, 6.

Insurance—

1. Application—False statement—No statement, whether true or false, contained in the application for life insurance in this case can operate to avoid the policy unless it was material to the risk, the terms of the application and policy being similar to those of the application and policy in the case of the German Insurance Co. v. Rudwig, &c., 80 Ky., 223.

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2. The court properly refused to submit to the jury the question as to whether the applicant had a certain disease prior to the date of the application, and properly limited the question to the time of the application, the disease not being inheritable or transmissible.
3. Evidence of disease—The opinion of a party that he has a certain disease is of no more value than the opinion of any other unskilled witness, and does not belong to that class of exclamations and complaints which accompany and describe present pain and malady, and for this reason the court properly excluded evidence of such expressions of opinion by the applicant, as well as for the reason that they were made long prior to the application, when the company had no interest in their subject-matter.
4. Judgment for interest - The prayer of the petition for judgment for the amount of the policy and interest thereon authorized a judgment for the aggregate sum of the principal and interest to the date of the judgment, with interest on the whole from that date. Conn. Mut. Life Ins. Co. Moss, &c. June 7, 1884. Jeff. Ct. Com. Pleas. Opin. by Hargis, Ch. J., Ct. Ap., aff. Bullock & Anderson for appellant; Isaac Caldwell and Jno. Russell for appellees.

Interest—See Insurance, 4.

Judgments—

1. Infancy as a ground to vacate—Where the right to have a judgment vacated is based primarily upon the fact that the parties seeking to have it vacated were infants at the time the judgment was rendered, the action to vacate must be commenced within twelve months after the plaintiff has attained the age of 21 years, and the fact that some of the plaintiffs are still within the statutory limit will be no protection to those who have allowed the time to elapse. The petition itself must show the right of the plaintiff to prosecute the action by alleging facts showing that the action is brought within the time prescribed.
2. Appeal—Where the error in a judgment against an infant appears on the face of the record it can be corrected only by an appeal. Figg, &c. v Richardson, &c. May 30, 1884. Louisville Chancery Ct. Opin. by Richards, J., Sup. Ct., aff. Burnett & Burnett, Jno. Williams and Jno. Stites for appellants; S. B. Richardson for appellees.

Limitation—See Judgments, 1—

1. Guardian and Ward—The statute of limitation runs against a guardian as to a cause of action upon a contract made with him for the benefit of his wards just as against any other person, and he is not protected by the infancy of his wards. Hummer, Gd'n v Orndorff's Ex'or. June 3, 1884. Logan Cir. Ct. Opin. by Hines, J., Ct. Ap., aff. W. F. Browder and Geo. B. Edwards for appellant; A. G. Rhea for appellee.

Master and Servant—

1. Injuries done by dog of servant—Under the statute which provides that "every person owning, having or keeping any dog shall be liable to the party injured for all damages done by such dog provided," etc., only the person who has the dog in his possession, whether rightfully or wrong-

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fully, is liable therefor; the owner of premises can not be held liable for injuries done by a dog, over which he had no personal control, merely because his servant, owning and controlling the dog, brought it with him to remain, for his convenience or company, during his hours of work. The appellee was bit at appellant's theater by a dog owned and kept there with appellant's knowledge, and without objection on his part, by a person employed by him to watch his theater. Held - That appellant, having no actual control over the dog, is not liable for the injuries to appellee. Whallen v Wetzell. June 16, 1884. Louisville Chancery Ct. Opin. by Bowden, J., Sup. Ct., rev. Kohn & Barker, and A. Duvall for appellant; O Neal & Chatterson for appellee.

Pleading and Practice in Criminal Cases—

1. Misconduct in argument -Alleged misconduct of the Commonwealth's attorney in his argument to the jury can not be considered, as there was no objection at the time the argument was being made.
2. Instructions—All the instructions given should be considered together, as an omission in one may be supplied by another.
3. Instruction as to self-defense—Upon the trial of appellant for manslaughter his right to stand and defend himself, if he believed the deceased struck him with intent to take his life or inflict great bodily harm, was secured by an instruction to the jury to find him guilty if they believed he "had a safe way of retreat and escape, and there was not any immediate impending danger, real or apparent, to his life or great bodily harm, at the hands of the deceased." Sugg v. Commonwealth. May 31, 1884. Henderson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. C. C. Ball and Yeaman & Lockett for appellant; P. W. Hardin for appellee.
4. Erroneous instruction -It was error to instruct the jury that if they believed any witness had testified to that which he knew to be untrue they had a right to disregard his entire testimony. Jump v. Commonwealth. May 31, 1884. Grant Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. W. Dickerson for appellant; P. W. Hardin for appellee.
5. Continuance—The court did not abuse its discretion in refusing to grant the defendant a continuance because of the absence of two physicians, who were summoned to testify as experts in surgery, but left the State before the trial and before the defendant had an opportunity to have their depositions taken, as it was not shown that other physicians of equal skill and experience in surgery might not have been summoned in time to have witnessed the trial and testified as experts, and as two other physicians did in fact testify as experts on behalf of the defendant, so that at most the evidence of the absent witnesses would have been cumulative only.
6. Objections and exceptions—A reversal can not be had because of an instruction to which there was no objection or exception.
7. Contradiction of witness—Evidence is not admissible to contradict a witness as to a collateral fact to which he has testified on cross-examination.
8. Res gestae—A statement made by the mother of the deceased in the afternoon of the day of the shooting and "a short time after the shooting." was not near enough in time to be admissible as a part of the res gestae.
9. Contradiction of witness—A witness being dead at the time her deposi-

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tion was offered evidence of statements made by her contradictory of the statements in her deposition was not competent, as he had not been inquired of concerning the contradictory statements. Bush v. Commonwealth. June 3,1884. Fayette Cir.Ct. Opin. by Hines,J.,Ct. Ap., aff. W. P. Tarleton and Jno. R. Allen for appellant; P. W. Hardin for appellee.

Practice in Civil Cases -

1. Plea of former adjudication - Absence of evidence—As the schedule orders a complete transcript of the record and the clerk's certificate is that the record is complete, and there is nothing in it even tending to sustain the defendant's plea of former adjudication, which the plaintiff traversed, the judgment is reversed. Kirtley, &c. v. Higdon, &c. June 4, 1884. Edmonson Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev P. F. Edwards for appellants; D. W. Wright for appellees.

Self-defense—See Crim. Law, 2; Evidence, 1, 2; Pleading, etc., in Crim. Cases, 2, 3.—

1. The accused having stabbed the deceased, not in self-defense, had no right, when knocked down by him, to take his life simply because the deceased was upon him pounding him with his fists, and the court properly refused to instruct the jury to that effect. Middleton v. Commonwealth. June 7, 1884. Jeff. Cir Ct. Opin. by Pryor, J., Ct. Ap., aff Whittaker & Parsons for appellant; P. W. Hardin for appellee.

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EDITORS:
HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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CURRENT TOPICS.

It appears from a statement recently published in the New York Times that the city of New York, with its millions of inhabitants, furnishes only 15,450 persons liable to jury service.

Every class in the community should be subject to jury service except perhaps the doctors, whose profession subjects them to sudden calls, where failure to attend or delay in attending might be fatal to life. Bankers, all classes of merchants, even preachers should be summoned.

It is most irrational to hear the intelligent men of the community indulging themselves in denunciations of lawyers and courts, and the immunity criminals enjoy, when they themselves are directly responsible for such immunity. If criminals are to be punished it is chiefly through the agency of intelligent and impartial juries. It is idle to talk about inconvenience to the juror and the sacrifice of his private interests. Such interests depend for their existence on the maintenance of public order, and the prompt and adequate punishment of crime. Men in active business, men of property, are those of all others who have the greatest interest in the efficiency of the jury system and are the last who should ask or receive exemption.

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The following question recently decided by the English Exchequer Division will be of interest here in the stock growing portion of the State. The defendant was arraigned for cruelty to animals, he having dishorned his cattle by cutting off their horns quite close to the skull for the purpose of keeping them from injuring one another when feeding in a yard, and obtaining a higher price for them in market. "The practice appeared to be one common among farmers, but it was proved that it occasioned much suffering to the animals, and the question really came to be whether it was a sufficient justification that the act was done, not wantonly, but for the purpose of convenience and profit to the owner. The magistrates declined to convict on the merits, but the Exchequer Division came to a different decision, and it is to be hoped that the judgment will be adopted in the future on similar occasions."

The Massachusetts Supreme Court affords an instance of the instability of judicial doctrines by its recent decision in Commonwealth v. Barnacle, 134 Mass., 216, where it is held that defendant, being on trial for homicide, may prove the character of deceased for ferocity, and that he was a larger and more powerful man than accused. The decision overrules Meade's case, 12 Gray, 168, which in turn overruled Selfridge's case, Whart. on Homicide, sections 150, 586. The latter case, as detailed by Dr. Wharton in a recent article in the American Law Journal, is very interesting. It appears that at a time when party feeling ran very high in Massachusetts between the Federalists on one side and the Democrats on the other, Selfridge, a prominent Federalist, got into a very angry controversy with Austin, a Democrat, and finally, losing faith in argument, resorted to villification, and posted Austin in very insulting terms. Expecting to be called to account he armed himself and the next day, seeing young Austin, the son of his opponent, approaching him with a cane in his hand, he pulled his pistol, fired and killed the young man. Party feeling ran so high that the affair was taken up as a party issue and Selfridge was indicted for manslaughter only and admitted to bail in a small sum (the Supreme Court of the State being composed of Federalists under the lead of C. J. Parsons). Upon

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the trial he set up that he acted in self-defense; that he was himself of slight stature and his opponent, young Austin, an athlete of great skill in fighting. The court admitted the evidence and Selfridge was acquitted, though it led to much scandal, and it was proposed that an appropriate head note to the case would be "Democrats, being ferae naturae, might be shot down whenever likely to become troublesome." The doctrine, as we have said, was reversed in Meade's case, but the latter has been since itself reversed in Barnacle's case supra. The same doctrine was decided in this State in Payne v. Commonwealth, 1 Met., 370, where it was held that evidence that the deceased was a man "of violent, cruel and bloodthirsty temper, and habitually carried concealed deadly weapons," was admissible. Wharton lays down two important qualifications of the rule, viz.:

First, Such evidence is inadmissible unless, in the opinion of the trial court, it should appear, at least as a prima facie case, that the defendant, in striking the fatal blow, was acting in self-defense. It would be no palliation of an assault by A on B that A believed B to be a powerful ruffian. And there are numerous cases when, there being no case of self-defense made out, such evidence has been properly rejected.

Secondly. It is inadmissible for the defendant to prove that the deceased had, on prior occasions, not connected with the defendant, committed ferocious assaults. The issue, as in all other cases where character is an element of proof, is reputation, not particular wrongful acts. It is inadmissible, for instance, when a defendant puts his character in issue for the prosecution to reply by putting in evidence specific wrongful acts by the defendant; and on the same principle proof is inadmissible of particular wrongful acts of the deceased.

The drawee of a bill of exchange, having written across the face of it "Kiss my foot" and signed his name to it, the Supreme Court of Iowa have been since engaged in determining what he meant by those words. They go at it in this serious way:

"But by the use of these words the defendant meant either to accept or refuse to accept the bill. It can not be he meant

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the former, therefore, it must be the latter. It seems quite clear to us that the defendant intended, by the use of the contemptuous and vulgar words above stated, to give emphasis to his intention not to accept or have anything to do with the bill or with the plaintiff."

A petition having been filed asking the disbarment of a Boston lawyer, the Herald of that city printed the petition before the case had come on for hearing or had been determined, and was sued by the attorney for libel. The lower court dismissed the libel on the ground that the publication was privileged, but the Supreme Court held otherwise, saying that while fair reports of judicial proceedings were privileged, yet the privilege did not apply to the contents of preliminary written statements of a claim or charge. If it did extend so far, a libel might be spread broadcast over the land by the easy means of entitling and filing a paper in a cause.

A requirement on the part of the company that a deposit of money to guaranty the payment of the price of gas used is not unreasonable, and the company may discontinue the supply of gas unless it is complied with. (Williams v. Mutual Gas Co., S. C. Mich., 17 Rep., 719.

A "dead beat" injured while stealing a ride on a railroad train can not recover, though the injury was caused by the company's neglect. A railroad owes no duty to those who obtain passage on its trains by fraud. (Way v. Chicago, &c., R. R., Co., 19 N. W. Rep., 828.)

In Henderson v. L. & N. R. R. Co., 20 Fed. Rep., 430, the Louisiana Supreme Court held where plaintiff, being a passenger on defendant's train, undertook to put down a window from which a strong draft was blowing on her, and in doing so she dropped a bag out containing a large amount of jewelry

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and defendant, being notified of the loss and the value of the jewels, refused to stop its train until it had reached the next station, whereby the jewels were lost, the railroad company were not liable. It was at most under a moral obligation to stop the train. This resembles the case of First National Bank v. Railroad Co., 20 Ohio St., 278, where plaintiff's agent had on his person $4,000, and the train fell through a bridge by which the money was lost. In suit against the railroad company for negligence the court held it not liable, saying that though a passenger has the right to carry about his person such a sum or even a larger sum of money, yet he can not make the railroad liable for it even in the event of the company's negligence unless he previously informs it of the risk, so it can protect itself and exact proportionate compensation.

The propsition recently laid down by United States District Judge Hughes in Virginia, that a citizen of a State may sue his own State in any of the United States courts, will no doubt startle and horrify all the believers in State's rights. Judge Hughes claims that such suit may be brought in any case involving a right under the United States Constitution or any Federal law or treaty: First, upon the authority of the Constitution, article 3, section 2, and the case of Cohens v. Va., 6 Wheat., 375, which establishes that a citizen can sue his own State in the United States Supreme Court in all such cases; and, second, under the act of March 3, 1875 (18 Statute, 470, chapter 137), and Ames v. Kansas (just decided by the United States Supreme Court) that any such suit may be brought in any of the inferior Federal courts. True, section 2, article 3, supra, gives the Supreme Court jurisdiction in all such cases, where a State is a party, but the jurisdiction there conferred is original, not exclusive, jurisdiction. Such jurisdiction is in fact concurrent with the inferior Federal courts, if the suit is brought in any of those courts, instead of instituting it in the first instance in the Supreme Court.

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COURT OF APPEALS OF KENTUCKY.

MOORE v. SETTLE.

(Filed June 14, 1884.)

1. Gaming—Recovering money lost—Married woman—The statute against gaming (General Statutes, chapter 47, article 1, section 4), which gives a right of action to the loser or his creditor, or any other person, to recover money lost at gaming does not embrace a married woman, the wife of the loser. The words "any other person" mean any one competent to bring the suit. The statute creates a new cause of action in favor of those already competent, but does not remove the disabilities of those before incompetent to sue. The opinion of the Superior Court in this case (which the following reverses) is published, 4 Ky. Law Rep., 972.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Hargis.

Under the title "Gaming", section 4, article 1 of chapter 47, General Statutes, it is provided that: "If such loser or his creditor do not sue for the money or thing lost within six months after its payment or delivery, and prosecute the suit to recovery with due diligence, any other person may sue the winner and recover treble the amount or value of the money or thing lost, if suit be so brought within five years from the delivery or payment."

This action, based upon that section, was brought in her own name by the wife of Evan E. Settle for money which had been won from him at cards by the appellant, Moore. She recovered judgment for the amount and Moore prosecuted an appeal to the Superior Court, which affirmed the judgment, Judge Bowden nonconcurring, and Moore appealed the case to this court. He contends that Mrs. Settle had no legal or equitable right under the statute to institute or prosecute the suit. That is the only question necessary to be decided, as it is vital and disposes of the controversy. The section means by the words "any other person," any other person competent to institute the suit.

It creates no new cause of action in favor of persons who could not sue. Nor does it relieve any person of disabilities existent at the date of its passage. It simply created a new cause of action in favor of such other persons, besides the loser and creditor, as had legal capacity, either in person or by another, to sue. Else aliens, the wife of the winner and others wholly incompetent to sue, could institute such actions, and

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thus, instead of the mere creature of a new cause, the statute would be misapplied to the removing of disabilities which are no part of its subject and not mentioned or alluded to in it. As, therefore, the statute has nothing to do with prescribing the capacity of "any other person" to bring such suits, leaving that branch of the law untouched, the appellee's right to sue the winner must depend upon the law found outside of this statute. We can find none to support her claim to sue. By the first subsection of section 34 of the Civil Code it is provided that "in actions between husband and wife; in actions concerning her separate property, and in actions concerning her general property in which he refuses to unite, she may sue or be sued alone."

This is not an action between husband and wife, nor is it an action which she may bring for him under subsection 4 of that section of the Code, for it is not alleged or claimed that he has deserted her. In all other actions in which she is the actor, except those named in the subsection quoted, her husband, committee, curator or next friend must join or prosecute the suit for her. So there is no suit like this that she has the capacity to bring in her own name in the absence of all the conditions and exceptions of section 34, supra.

It can not be soundly said this suit is concerning either her separate or general property in the sense of that section of the Code.

For that character of property does not embrace mere rights of action for injury sustained by the wife during coverture for assault and battery, slander and the like, or for rights of which she is the meritorious cause, either at common law or by statute, unless the statute in creating a new cause of action authorizes her to sue or invests her with general or separate estate in the subject-matter of the action. In actions for personal injury inflicted upon the wife during coverture the husband and wife must join. But the husband may generally sue alone, or unite his wife with him for any ordinary right not concerning her general or separate estate accruing during the marriage relation, and in such cases the common law, which is virtually continued by subsection 2 of section 34, supra, has wisely left the propriety of instituting such actions to the discretion of the husband, and sound reason, domestic peace and good pub-

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lic policy unite in sustaining the rule that gives to the husband such control. Our statutes have made but little change, if any, in these rules, except to allow the wife to sue if the husband deserts her, and to enable her to protect her separate or general property. When statutes, like that in regard to inebriate husbands, give the wife the right to sue and recover, she may do so by force of the express words of the statute, and the fact that the cases in which she may sue are generally provided for in the Code of Practice and statutes creating new causes of action which expressly invest her with that right, furnishes a strong presumption that her capacity to sue, which has been increased by statute from time to time, must be ascertained from the language of such statutes and unrepealed consistent common law rules. The wife, where she is the meritorious cause, under a statute like this or under the one authorizing rewards, may be a proper or necessary party, yet she could not maintain such actions without joining her husband unless he deserts her, then she might bring or defend them in his name.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellant a new trial and for further proper proceedings.

Warren Montfort for appellant.

O. B. Hallam for appellee.

PORTER, &c. v. FORD, &c.

(Filed June 19, 1884.)

1. Will—Married woman—A will executed by a married woman during the life of her husband, but subsequently, after his death, admitted by her to be her will is valid.

2. General Statutes, chapter 113, section 11, regulating manner of re-executing will once revoked does not apply to married women.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal from a judgment of the Kenton Circuit Court ordering to probate a paper dated June 8, 1868, as the last will of Mrs. Lucy L. Porter, who died in 1881.

The paper was wholly written and subscribed by her. But

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at the date it bears she was a married woman, the wife of Thomas Porter, who died in 1875.

By it she devised to her daughter, Mrs. Lucy E. Ford, her residence in the city of Covington, and all her personal property except certain specific legacies, which she directed paid to the Baptist Home Missions, to her son, Thomas Porter, jr., and two grandchildren. There is also a clause directing that her husband shall have the full benefit of a home with her daughter, and necessary furniture.

Mrs. Porter received the real estate mentioned under the will of her father, the personal property was subsequently acquired by the will of her husband.

It appears that the paper in contest was found after her death in a trunk where she kept her private papers, that only herself and her grandson, whom she instructed, knew how to open. And when found it was inside an envelope which was inclosed in two others, the outer one only being then sealed, though the other two appear to have been previously sealed. There is an endorsement in her handwriting upon each envelope. Upon the first are written the words, "Lucy Porter, private," upon the next, "Private, Lucy Porter," and upon the outer one, which is the largest, "Private, not to be opened until my death, Lucy Porter."

Subsequent to the death of her husband Mrs. Porter frequently stated she had made a will devising all her property, except a few legacies, to her daughter, Mrs. Ford, giving as her reason for so disposing of it that her other children had received more than their shares from their father, and also said that her will would be found after her death in her trunk.

There were originally in the body of the instrument two gifts to Lucy Ford, now Mrs. Whillock, a daughter of Mrs. Ford, one of them being a silk quilt and the other $1,000. Both of these gifts have been erased, though by close inspection they may be indistinctly seen. To Mrs. Ford the testatrix said, in explanation, that she had given to Mrs. Whillock the silk quilt, but having afterwards made a bridal present of it to another person, she erased the gift from the will. And to Mrs. Whillock she stated she had given her $1,000 by her will, but since her, Mrs. Whillock's, marriage, she had erased it, inasmuch as

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she was then well provided for and did not need the money as much as her mother.

As both the occurrences which constituted the reasons for the two erasures took place subsequent to the death of Mrs. Porter's husband, the changes must have been made after that event.

The disposition of her property by the paper in contest, as well as the reasons therefor as stated in it, are entirely consistent with the repeated expression of her wishes and intentions made after the death of her husband, as well as with the declarations of both of them made before he died. And when the erasures made by her, the condition of the envelopes and endorsements thereon corresponding with, if not evidence of, the changes made by her from time to time, and the care with which it was finally sealed up and placed in her trunk, are considered in connection with her frequent consistent and uniform declarations in respect to it, the conclusion is inevitable that the paper in contest was, after the death of her husband, deliberately adopted, recognized and intended by Mrs. Porter to be her last will.

Such being the case, and no controversy arising as to the paper being wholly written and subscribed by her, nor as to her mental capacity to make a will, the only question presented is whether it should be held a valid will, notwithstanding it was written in 1868, while she was a married woman.

The sections of chapter 113, General Statutes, which have any application are as follows:

"Sec. 2. Every person of sound mind not being under twenty-one years of age, nor a married woman, may by will dispose of any estate, right or interest in real or personal estate that he may be entitled to at his death which would otherwise descend to his heirs or pass to his personal representatives, and though he may become so entitled after the execution of his will."

"Sec. 5. No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself or by some other person in his presence and by his direction, and, moreover, if not wholly written by the testator the subscription shall be made, or the will acknowledged by him in the presence

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of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

We have not been able to find any case arising under the statutes of wills in this State or similar statutes elsewhere in which the exact question now presented has been definitely decided. Nor is there any provision of the General Statutes which fully meets this case. It must, therefore, be determined according to the reason and analogy of the law.

"Publication, when spoken of a will, signifies that a testator has done some act from which it can be concluded that he intended the instrument to operate as a will" (Bouvier's Law Dictionary). And in order to insure identity and prevent fraudulent additions to or alterations of the instrument the General Statutes require, in every case where the will is not wholly written by the testator, that "the subscription shall be made or the will acknowledged by him in the presence of at least two witnesses who shall subscribe the will with their names in the presence of the testator."

But in the case of a holograph will no acknowledgment by the testator, attestation by witnesses, nor any other mode of publication than that it be wholly written and subscribed by the testator is necessary to make it valid.

By section 11 it is provided that "no will or codicil, or any part thereof which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revise the same is shown thereby."

Even if it be conceded that this section has reference to a will wholly written by the testator, as well as to one that is required to be acknowledged and attested in the manner prescribed in section 5, still, as the object of the section is merely to provide the mode in which a will that has been revoked may be revived, it can have no application to the will of a married woman which, being invalid or inoperative during coverture, can not in the meaning of the statute be revoked.

In this case there has been no revocation and consequently there could not be a republication in the sense the word is used in case of a will. But the paper which was wholly written

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and subscribed by the testatrix while she was a married woman has, after the death of her husband and when she became capable of making a will, been adopted, identified and left by her as her will.

Does the law require more to be done than has been done in this case? We think not. For certainly there is no provision in the General Statutes which, either in terms or by necessary implication, requires the holograph will of a married woman to be rewritten or resubscribed after she becomes discovert in order to make it valid. Nor is there any reason why the will in this case should not be held valid.

It is as fully identified and as certainly and entirely the will of Mrs. Porter as if she had rewritten and dated it after the death of her husband. For when competent to make a will she acknowledged, recognized and by repeated and unequivocal acts and declarations made it conclusive that she desired and intended the instrument to operate as her will.

The objection urged that oral testimony must be relied on in this case in order to establish the paper in contest as the will of Mrs. Porter applies here no more than in any other case. For this will, like every other valid will, speaks for itself, and the simple inquiry is whether it is her will, and to that extent and for that purpose only is it necessary to rely upon oral testimony.

As has been often held "in every adjudication of this court involving the publication and attestation of wills a substantial rather than a literal compliance with the statute has been demanded, and if its object and intent were reached without a violation of its express language that is all that has been required." (Soard v. Soard, 1 Duvall, 126.)

As the paper in contest, beyond any controversy, disposes of the estate left by Mrs. Porter according to her wish and intention, and was, while she was competent and had the right under the law to make a will, adopted, recognized and left for her will, it should be admitted to probate as such. For, in our opinion, it can be done without a violation of either the letter or spirit of the statute.

Wherefore, the judgment is affirmed.

Benton & Benton for appellants.

M. J. Dudley and O'Hara & Bryan for appellees.

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HARRIS v. THE MERZ AGET IRON WORKS.

(Filed June 19, 1884.)

1. Pleading—A alleges B is indebted to him in a specified sum for work done at her instance and request. B denies she owes A any sum whatever, and alleges that the claim sued on has been paid, Held—The only issue is that of payment and the allegation as to the value of the work (not being denied) is admitted under Civil Code, section 126. (2.) Burden of proving payment is on B.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hines.

The first question to be considered is as to what issues are raised by the pleadings. Cross appellant Buckley alleges "that defendant, Adaline Harris, is indebted to him in the sum of $1,177.40 for labor and material furnished to her at her special instance and request in making and putting in counters, tables and shelving in her dry goods and clothing store."

To this appellants answer: "They deny that they or either of them are now or that they were on the filing of the original petition or on the day of filing defendant Buckley's answer and cross petition indebted to him in the sum of $1,177.40, or in any sum whatever. They admit the work set out in the petition, but say that they paid him for it in full long before the institution of this suit."

Subsection 4 of section 126, Civil Code, is as follows: "Allegations concerning value or amount of damages, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed."

The allegations of appellants' answer to the cross petition as to payments being traversed by reply, what is the issue? Does the cross petition of appellee Buckley contain "a statement of facts showing an implied promise" to pay the amount claimed? If it does contain such allegations, and we think it unquestionably does, there is no issue but that of payment. The cross petition, accompanied by an itemized account, alleges an indebtedness of $1,177.40 for certain labor and material done for and furnished appellants at their special instance and request. It is wanting only in one averment to make an express prom-

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ise, and that is that appellants promised to pay the sum set out in the cross petition. Such an averment would have made it unquestionably good under the provisions of the Code quoted, and if the allegations do not raise an implied promise to pay the sum alleged to be due, it is difficult to conceive what allegations would be sufficient for that purpose. The Code of 1854, section 153, makes no provision for either an express or an implied promise. It reads: "Allegations of value, or of amount of damage, shall not be considered as true by the failure to controvert them," and yet it was held by this court in Harris v. Ray, 15 B. Monroe, 630, construing the Code of 1854, that in an action on a medical account no proof of value, without denial, was necessary where the petition charged that the amount claimed was due and owing. This opinion has never been expressly overruled, but there followed apparently conflicting decisions in cases ex delicto, and it is for this reason that the alteration was made in the language of the present Code. The alteration or change, if it means anything, means that a recovery may be had in any case whether ex contractu or ex delicto where there is neither an express or an implied promise to pay the amount sought to be recovered. That it was intended to apply to both classes of cases is clear from the change in the language of the Code of 1854, section 409. "If the taking of an account, or proof of a fact, or the assessment of damages, is necessary to enable the court to pronounce judgment upon a failure to answer * the court may * hear the proof and in 'actions founded on contract,' assess the damages." The present Code omits the words "founded on contract." (Section 379, Code 1877.)

If there could be any doubt as to the correctness of this construction it is removed by the answer of appellants to the cross petition. That answer admits that the work was done as charged and that there had been due and owing therefor the sum charged, and relies solely upon payment of that sum "in full." The provisions of neither Code has been or could be applied in any case where the charge of value or amount of damages is admitted in the answer, as is substantially done in this case.

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The next inquiry is as to whether appellants have paid to Buckley or for him the sum sued for of $1,177.40, and on that issue the burden of proof is on appellants.

It appears that Buckley had a contract with appellants to furnish material and construct for them a house. That on the 3d of January, 1882, a settlement was had under this contract and for extra work done under that contract. A receipt was at the time executed by Buckley which reads: "Received of Mrs. Adaline Harris $10,062.15, in full payment for contract and all extra work on her building (on Main and St. Clair streets) except shelving. No claim to be made by said Mrs. Harris for any unfinished work. M. BUCKLEY.

"Frankfort, Ky., January, 3, 1882."

The evidence shows that the contract as to the shelving and counters was made subsequent to and independent of the contract to furnish material and erect the building.

There is no evidence of any payment made by appellants subsequent to the settlement of January 3, 1882. The principal reliance for evidence of payment on the contract for shelving and counters is, first, upon the fact that Buckley admits that he received $10,952.85 on the contract to build the house, while the receipt quoted acknowledges only $10,062.15; and, secondly, that a sum of $500 is claimed by Buckley as having been agreed to be paid as for bonus in obtaining the contract. The discrepancy between the receipt and the amount of money admitted to have been received by Buckley is explained in his evidence by receipts for the payment of certain claims and deductions made from charges made by him. But without this burden of proof being on appellants the receipt quoted, which is not attacked for fraud—neither is the settlement—should be a sufficient answer to and explanation of this apparent discrepancy. It expresses to be "in full payment for contract and all extra work * * * except shelving."

The proof of the agreement to pay the bonus of $500 seems to be sufficient. Buckley testifies expressly to the agreement; Harris, as the fully authorized and acting agent for Mrs. Harris, denies the agreement; D. L. Haly testifies that Harris told

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him he had agreed to pay this bonus. A fuller discussion of the evidence is considered unnecessary.

Judgment affirmed on the appeal as to all the parties, reversing on the cross appeal of Buckley, with directions to enter judgment for Buckley for the sum of $1,177.40, with interest from the date of the filing of the cross petition by Buckley, and for sale of the property described in the petition for the payment of the claim adjudged in the decree.

A. Duvall and Wm. Lindsay for appellant.

J. & J. W. Rodman and G. W. Lindsey for appellees.

SUPERIOR COURT.

BANK OF LOUISVILLE v. GRAY, &c.

(Filed June 13, 1884.)

1. A married woman may give a power of attorney authorizing an agent to sell property held by her as separate estate.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bowden.

The appellees were married prior to 1872. In October of that year money coming to the wife from the estate of a deceased brother was invested in thirty-five shares of the stock of the Bank of Louisville, and a certificate therefor was issued to "Geo. E. H. Gray, trustee for Lucy A. Gray." The investment was made during the husband's absence, but he subsequently approved it, and as trustee received the dividends up to January, 1875. In January, 1874, the husband, then in New York, executed a power of attorney, signed by him as trustee, authorizing Thos. H. Hays to sell and transfer the stock. A few months afterwards the wife, who resided in Kentucky, also signed the power of attorney. Thus authorized, Hays sold and transferred the stock to the appellant for its full value, receiving the price. This was done in April, 1876. In 1882 Gray and wife sued the appellant to recover dividends declared after January, 1875, claiming that the stock was the wife's separate estate, and that the power of attorney was void.

If the stock was not the wife's separate estate there can be

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no doubt that the agent was sufficiently authorized and that the sale to the bank passed the title to the stock.

If it was her separate estate and the power of attorney was a valid appointment of Hays, whereby he was empowered to make the sale, the title passed.

It was decided by the lower court, and it is insisted here, that in the absence of a statute authorizing a married woman to execute a power of attorney, and so convey her estate through an agent, the power does not exist; and that, as we have no statute authorizing such appointment by a wife residing in this State, the appointment of Hays was void.

That this is true in regard to the conveyance of her general real estate there can be no doubt. She can pass her title by such method only as the statute prescribes. After it had been provided that she might convey such title by a deed made directly to the purchaser she still could not convey through an agent.

It appears that a married woman residing in this State is yet incapable of conveying otherwise than by her own deed. By an act approved February 1, 1812 (M. and B., 1,330), a married woman residing in any other State of the United States, or in any of the territories, was empowered to convey by an agent duly appointed by a power of attorney to be acknowledged and recorded. This act was not incorporated in the Revised Statutes, but it was provided by an act approved February 23, 1856, that a married woman not residing in Kentucky might convey any interest she had on personal or real property by an agent under a power of attorney. This act was carried into the General Statutes as section 36 of chapter 24 on "Conveyances."

Though not in terms so declared, the act of 1856 was really an amendment to the chapter in the Revised Statutes on conveyances, the provisions of which did not apply to separate estates (Stuart v. Wilder, 17 B. Mon., 58). As the Revised Statutes absolutely prohibited the sale of a separate estate the amendment could not have been intended to provide a method of doing that which could not be done. It related exclusively to the sale and conveyance of such general property as might be sold and conveyed. But as section 17, article 4, chapter 47 of the Revised Statutes, which made separate estates inalien-

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able, was omitted from and thus repealed by the General Statutes, it may be that section 36, chapter 24, should be regarded as relating to the sale and conveyance of separate estates by nonresident married women, acting through agents duly empowered, if it is indeed necessary to have recourse to the statute in order to maintain conveyances so made.

But it seems evident that the statute, whether in the form of the act of 1812, of the act of 1856, or as section 36, chapter 24 of the General Statutes, is an enabling act, intended to confer on nonresident married women a right which otherwise no married woman would have had. It certainly was not intended to deny or restrict an existing right. Even if it were clearer than it is that separate personal property is referred to or embraced by the act of 1856 as incorporated in section 36, chapter 24 of the General Statutes, still, as language is affirmative, it goes no further than to declare a method whereby a nonresident married woman may sell and convey, but it does not deprive the resident married woman of the same or any other power which she has independent of the statute. If, therefore, Gray and wife would have had the right to dispose of the bank stock through an authorized agent, though there had been no such statute, its existence can in no way affect that right.

A married woman, having a separate personal estate, is treated in equity, with respect to that estate, as a single woman. She is regarded as the exclusive owner. As an incident to this ownership the right of disposal exists. Kentucky is in the line of States holding the doctrine of the English chancery that this power to dispose of the thing owned exists by reason of the fact that she does own it, and not by reason of a power conferred by the donor. Refusing to admit the existence of any disability which precludes the power to sell, the court should not, it seems to us, restore those disabilities for the purpose of controlling the exercise of the power by selecting the mode. If she may sell face to face with the purchaser, what good reason can be given why she may not avail herself of the convenience of agencies? If she is to be treated as a single woman with respect to the fact of ownership, with respect to the resultant right of sale, why should a court of equity, having rejected so far the dogmas of the common law, invoke them for the mere purpose of placing fetters on the ex-

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ercise of a power the very existence of which these dogmas deny? We have not found any case in which it has been decided that a married woman having a separate personal estate may deal with it or sell it by her agent as if she were not married, but this right seems to us implied in the very nature of her estate.

It is our opinion that the power of attorney gave Hays full authority to sell the stock, and that the sale by him vested the title in the purchaser.

None of the cases decided respecting sales while the provisions of the Revised Statutes were in force are pertinent. The authority to Hays was given after they were repealed.

The judgment is reversed and the case remanded, with directions to dismiss the plaintiff's petition.

Hamilton Pope and Wm. Lindsay for appellant.

R. W. Woolley for appellee.

ROBERTSON v. JONES, GIVEN & CO.

(Filed June 18, 1884.)

1. A certificate of deposit is in this State a mere receipt, the endorser of which is the drawer of a bill for the amount of the certificate.
2. Such certificate is to be construed according to the law of the place where it was issued and is payable.
3. An action on such certificate is barred here after five years.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Bowden.

A certificate of deposit is treated as a negotiable promissory note (1 Parsons on Notes and Bills, &c., 26; Miller v. Austin, 13 Howard, 218; Pardee v. Fish, 60 N. Y., 265). That is the effect given to it where a promissory note payable to order or bearer is negotiable, but in Kentucky, where such notes are not negotiable, it is regarded as a mere receipt, the endorser of which is to be treated as the drawer of a bill for the amount named in it. (Clary v. Piner, 17 B. Monroe, 663.)

The certificate of deposit sued on in this action was issued in New York and was payable there. The demurrer to the answer admits that by the law of that State its legal value was that

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of a promissory note placed on the footing of an inland bill of exchange. It must be so treated here. (Goddin v. Shipley, 7 B. Monroe, 575; Carlisle v. Chambers, 4 Bush, 269.)

Our statute bars after five years an action on a promissory note placed on the footing of a bill of exchange, foreign or inland. It barred this action.

The judgment is affirmed.

C. T. Atkinson for appellant.

Isaac Caldwell, W. W. Thum, J. S. VanWinkle and C. H. Rhodes for appellees.

GARROTT, &c. v. RATLIFF.

SAME v. WILLIAMS, &c.

(Filed June 16, 1883.)

1. The statement of the bill that a certain instruction was given or refused, to which a named party excepted, can not be controverted by affidavits filed after the bill was made up that no such exception was taken.
2. Where the bill purports to state the evidence in full no formal certificate of that fact by the judge is necessary; it is sufficient if he sign it.
3. Instructions—It will be presumed that no other instructions than those set out in the bill were given or refused unless the contrary appears.
4. Estoppel—One whose signature has been forged is not bound by his admission of its genuineness unless another has, to his injury acted on that admission.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Bowden.

The appellees move this court to strike from the record what purport to be instructions Nos. 1, 2, 3, 4, 5 and 6 copied in what purports to be a bill of exceptions. In aid of this motion they have had brought up by certiorari a copy of the original bill of exceptions from which they contend it will appear that the instructions were not literally copied into that bill, but were directed by it to be inserted. They appear in the transcript, however, as copied at large in the bill. The rule adopted both by the Court of Appeals (Meaux v. Meaux, 5 Ky. Law Rep., 550) and by this court (Arnold v. Hicks, 5 Ky. Law Rep., 511) is that when the transcript shows the bill contains the instructions the court will not look at the original bill

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unless an affidavit is filed showing that the instructions copied are not in fact those given or refused. No such affidavit having been filed the motion is overruled.

They also move the court to strike from what purports to be a bill of exceptions the statement that "to the giving of instruction No. 2 the defendants excepted. The defendants also asked the court to grant instructions No. 6, * * which he refused to do, to which the defendants excepted." To sustain this motion they rely on various affidavits copied into the transcript which they suppose show that the exceptions were not taken as stated. The affidavits are not made part of the bill of exceptions. They are not referred to by it or by any order of court. They do not purport to be a part of any proceeding in any court. By what authority they are made ostensibly a part of the record of these cases does not appear. It is true the clerk's certificate comes after the affidavits, and is to the effect that the preceding pages contain a true and complete transcript of the causes named therein; and that endorsements on the affidavits show they were filed in open court September 22d and September 23d, the bill of exceptions having been filed September 18th. But even if the mere act of filing these affidavits made them part of the record for all legitimate purposes, we fail to see any use which they can subserve. We do not know any statutory provision or rule of practice that permits a party to contradict the record, as made up by a bill of exceptions by affidavits filed thereafter. Section 337 of the Code provides that if the judge approves the bill as prepared by the party "he shall sign it, and it shall be filed as part of the record." If he does not approve "he shall correct it, or suggest the correction to be made and sign it. A party objecting to the judge's correction of an exception which purports to state the evidence may, within five days after the bill is signed, file the exception as written by him, if its truth be attested by the affidavit of two bystanders; but its truth may be controverted and maintained by other affidavits filed in the clerk's office, not exceeding five on either side." It seems plain that the right to controvert the judge's version of what occurred is limited to that part "which purports to state the evidence." What a witness stated bystanders may be relied on to prove,

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but it was not intended they should dispute with the judge respecting his rulings or in regard to exceptions taken to those rulings. The motion to strike out the portion indicated is overruled.

Finally, the appellees move the court to strike out what purports to be the bill of exceptions, on the ground that the judge did not certify that it is true. They refer to section 339 of the Code, which provides that "in cases in which, by subsection 2, of section 335, the evidence is required to be stated in full the judge shall certify in the bill of exceptions that it contains all the evidence. In all other cases he shall certify that the bill of exceptions is true." Subsection 1 of section 335, provides that a party need not state the evidence, but must state the material facts which the evidence conduces to prove, and subsection 2 provides that if the judge refuse to sign the bill of exceptions as presented, or if the party wish to appeal upon the grounds that the verdict is not sustained by the evidence, it shall be stated in full. One of the grounds presented by the appellants for a new trial was that the verdict was not sustained by the evidence, and accordingly the bill of exceptions states the evidence in full. We do not suppose that any formal certificate is required, or that the word "certify" as used in section 339 was intended to require anything more than is required by section 337, which treats the signature of the judge to what purports to be a history of the trial as completing the certificate. The motion to strike out the bill of exceptions is overruled.

It is provided by section 337, subsection 2 of the Code, that if a party "except to a decision of the court in granting or refusing any instruction, all instructions given and refused shall be also included." It is to be observed that in cases in which all the evidence is to be stated in the bill of exceptions the Code requires the judge to certify that it is all included, but while it directs that all instructions given and refused shall be included it does not require it to be certified that all are included. Nevertheless the general theory of appellate jurisdiction, which reverses for errors apparent on the record and always presumes in favor of the court below, would seem to require the appellant, in preparing his bill of exceptions, to pre-

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sent all of the instructions given to the jury in order to show that the giving or refusing of which he complains was prejudicial to him. It had occurred to us that in some way it must affirmatively appear that all the instructions are set out in the bill, not that an express statement that they and no others were given or refused is essential, but that the language of the bill must be such as to import that all the instructions are in the record. If (as in Clem v. Commonwealth, 3 Met., 10; Jane v. Commonwealth, 3 Met., 18) the statement of the bill might be literally true, and yet there might be other instructions not in the record, it is difficult to see how it can be said that it appears affirmatively that all instructions are in. In Smith v. Commonwealth, 1 Duvall, 22, and in Mickey v. Commonwealth, 9 Bush, 598, it was decided that a statement that the court "instructed the jury as follows," giving the instructions, imported that all the instructions given were contained in those copied; so that these cases do not differ from the others in regard to the rule that it must affirmatively appear that all instructions are in, but only in distinguishing between the language of the bills as being sufficient under the rule. These were all cases under the old Criminal Code. But in Meriwether v. Tucker, MSS. opinion filed October 25, 1881, the language of the bill was: "The defendant then offered the following instructions"—being No. 1 and No. 2, and copied—"which were refused by the court, to which defendant excepted. The court gave the following instructions"—there copied. The court said: "The court will presume these were all the instructions given or refused, in the absence of some fact in the record indicating that there were additional instructions." And the case was reversed for error in giving the two instructions. We must accept this as an authoritative construction of that part of subsection 2 of section 337 which has been quoted. For language indicating that the instructions copied were all that were given or refused a presumption is substituted. Under this rule we must presume that no instructions were given or refused other than those there copied, no words in the bill indicating the contrary.

These were separate actions at law on promissory notes, to each of which there was a plea of non est factum. By consent

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they were tried together by the same jury, and in each case a verdict and judgment were rendered for the plaintiffs.

At their instance the court instructed the jury "that though defendant did not sign the notes in issue, yet if after some were signed and put in circulation the defendants, or either of them, admitted or recognized said notes, or either of them, as being genuine, then such defendant, as to the note so admitted, would be bound, and the jury should so find."

The plaintiffs' evidence was that the money was lent to Shanklin, who delivered to the lenders his notes with the names of the appellants signed as sureties. There was nothing in the evidence from which it could have been inferred that the notes were accepted with any other understanding than that the appellants were sureties, or that if they were bound at all they were bound otherwise than as sureties. It is true the answers did not allege that they were strangers to the consideration, and, therefore, they could not, on a plea of non est factum, preclude the plaintiff from proving they were bound by the signing of another having only oral authority (Young's Adm'r v. Hildreth's Adm'r, 5 Ky. Law Rep., 129). But the absence of that peculiar statutory plea did not diminish their rights under the plea of non est factum. The instruction must be restrained to a state of case in which it is conceded that the defendants are bound, if at all, as sureties. It could not have been understood otherwise by the jury, nor could their verdict have been sustained if it had to rest on the assumption that the defendants were parties to the consideration. Thus restrained, the instruction affirms that if the defendants did not sign the notes, if their names were signed as sureties by some one else, and they admitted or recognized them as genuine, they are bound, whether they authorize their names to be signed or not, and even though their names were forged. The defendants were bound if they signed the notes, or if they authorized the signing by the person who did sign them; and they might be liable to a holder who had taken the notes for value by reason of their conduct, which might preclude them. But the instruction does not predicate their liability on any matter of estoppel. It lays down the rule that they are bound inevitably by an admission of genuineness, under whatever circumstances

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made, to whomsoever made, for whatever purpose made, and though it may in no degree have affected the conduct or rights of others, and even though the persons interested may never have heard of the admission till proved on the trial. The instruction did not tell the jury that they could consider the admissions and recognitions as tending to prove that the notes had been signed by them or by their authority, but that they were bound, though they did not sign nor authorize the signing, though the notes were as to them rank forgeries, yet they might become bound by any sort of admission made at any time, anywhere, to any one, though the proof was clear that they were strangers to the consideration; "that one who never signed the paper, or whose name was signed without authority or claim of authority to do so—whose name was simply forged—can not be bound by a subsequent promise to pay the debt or ratification of the signing of his name, is, we think, clear upon both principle and authority." (Warren v. Fant's Trustee, 79 Ky., 2.)

The judgment is reversed, with directions to set aside the verdict and judgment in each case and to grant a new trial in each.

Jno. Feland and A. Duvall for appellants.

W. P. D. Bush for appellees.

WELLS v. MALEY.

(Filed April 16, 1884.)

1. Sale of goods—Where anything remains to be done to the goods to put them in a deliverable condition or to determine the price by weighing or measuring, the performance of such things is a condition precedent to passing the title. (2). In such case if after the condition is performed the buyer refuses to accept or pay for the goods, the vendor may keep them and sue for the difference between their market value and the agreed price, or may sell to satisfy his lien for the purchase money, sue for the deficit, or may set the goods aside as the vendee's property and sue for the agreed price.

2. Where A agrees to buy goods of B it is no sufficient defense to a suit for refusal to accept and pay for the goods for A to set up that he bought as agent for another under a mistaken belief that he had authority so to do.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Bowden.

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Maley sued Wells, alleging that in April, 1882, "he sold to Wells a certain crop of tobacco, then in a barn on the premises of said Wells, at the price of 18 cents per pound for the leaf and lugs and 5 cents per pound for the trash, said crop of tobacco to be delivered at the warehouse of Thomas L. Best, in Helena, Ky., in good keeping order;" that in July, 1882, the tobacco was in good keeping order and that he then "proposed and was ready and willing and offered and was able to deliver the same at Best's warehouse at Helena as by contract he agreed to do," but Wells "declined and refused to receive the same, and directed plaintiff not to deliver the tobacco, and told him he would not receive it or pay for it if delivered, and the tobacco remained in plaintiff's possession in the barn on defendant's premises, and there still remains, subject to defendant's order." He alleges that the value of the tobacco, at the agreed price, was $317.50, and concludes by saying that "by reason of defendant's refusing to comply with his contract with plaintiff and receive said tobacco and pay for same, as he agreed to do, plaintiff has been greatly damaged, to wit, in the sum of $317.70;" wherefore, he "prays judgment for $317.70, with interest from July 10, 1882, and for all proper relief."

The answer contained three paragraphs. The first denied that Wells bought the tobacco or that he refused to give it or pay for it. The second averred that Wells told Maley that Best had sent him to buy the tobacco for the firm of Best & Bro., and that "in that way he bought the tobacco of plaintiff for Best & Bro., as their agent." The third admits that Wells misunderstood Best, and that he in fact had no authority to buy the tobacco for Best & Bro., and that he so informed Maley a few days after the purchase, and told him he could sell it to any one else—and that this was "before the tobacco was ready for sale or delivery." The second and third paragraphs were traversed by a reply.

It may be inferred from the petition that the tobacco was not in a condition to be delivered at the time of the alleged sale. Maley's testimony is conclusive that it was not. He stated that he was "to prepare it for market and deliver it in good bulking or keeping order at the warehouse of Best & Bro.,"

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which was fifteen miles from the barn. Other testimony shows the tobacco was not stripped at the time. There remained, therefore, these things for Maley to do: First, to prepare the tobacco for market; second, to carry it to Helena; and, it may be third, to have the quantity determined by weighing, so as to ascertain the price.

Whether a given transaction in regard to a specific chattel is a bargain and sale, passing the title to the bargainee, or only an agreement to sell and deliver on the one part, and to buy and accept on the other is a question of intention.

"First. Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property; second, where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted." These rules are given by Benjamin in his treatise on Sales as the settled law in England. They are recognized in this State. (Jennings v. Flanagan, 5 Dana, 217; Crawford v. Smith, 7 Dana, 60; Brown v. Childs, 2 Duvall, 314; Newcomb v. Cabell, 10 Bush, 460.)

The title to the tobacco, therefore, did not pass from Maley to Wells by the contract alleged and proved.

As the result of the English cases Benjamin lays down the rule that "where the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the

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buyer is for damages for nonacceptance; he can in general only recover the damage that he has sustained, not the full price of the goods."

This is to be understood as meaning that he can not recover the price eo nomine, but can recover only such damages as results from the buyer's breach of his contract, which, as he proceeds to state, is in general "the difference between the contract price and the market price of such goods at the time when the contract is broken." Obviously, however, it is not impossible that such goods may then have no market price, and may have no value, so that the measure of damages should be the price agreed to be paid; not, however, because it was agreed to be paid, but because the failure to accept the thing at the agreed price has, under the peculiar circumstances of the case, damaged the seller to that extent. The price, as such and because agreed on, can be recovered only when the title to the thing has vested in the buyer.

If by the terms of the contract the title passed, the vendor, where no credit is to be given, has a lien for the price, and the right to possession remains in him until the vendee pays the price or tenders payment; the payment or tender being, therefore, a condition precedent to the vendee's right to recover the thing sold. Nor can the vendor, maintain an action for the price until he has surrendered the possession, or until he is ready and willing to surrender it at the proper place on payment of the price.

A contract deemed executory when made, because something remains to be done by the vendor is regarded as executed when the vendor has done all he was bound to do. In such case it is presumed, when the contrary does not appear, that the parties intended that the title should not pass from the vendor until he performed the thing to be done, but that, immediately upon the doing of it, it should pass and vest in the vendee (Crawford v. Smith, 7 Dana, 59). In that case it was said that "a sale of tobacco, at a fixed price per hundred weight, to be ascertained by weighing, will not constructively vest the rights of property in the vendee until after the tobacco shall have been weighed, and the entire quantity and price of it thus rendered certain according to the intention of the parties; but as soon

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as the weight of the tobacco shall have been ascertained the property will, eo instanti, vest in the purchaser, even though he may not yet be entitled to the possession of it, without paying the price or assuring the payment of it according to the terms of the sale." In Jennings v. Flanagan, 5 Dana, 217, the case was that Murphy had agreed that Jennings & Co., who had let him have some money, should have his unprized crop of tobacco at $6 per hundred weight, to be paid on the delivery of the tobacco. Murphy sold the tobacco to Flanagan, and Jennings & Co. sued Flanagan for it in trover. It was held they could not recover, not only because they had not paid or tendered the price, but because "the quantity of tobacco had not been ascertained, and it was necessary the vendor should prepare it for delivery and have it weighed before there could have been a delivery or payment of the stipulated price." It is obvious that the word delivery is used here with reference to the passing of the property in the tobacco.

In Cook v. Brandeis & Crawford, 3 Met., 556, the case was that Cook contracted with Brandeis & Crawford to sell them his crop of wheat at $1 per bushel, to be delivered at Cook's landing as soon as it could be threshed out. Cook delivered part of the wheat and offered to deliver the balance, which B. & C. refused to take, whereupon Cook sold it for 72 cents a bushel and sued to recover the deficit of 28 cents per bushel. The court said: "In such cases—that is, where the vendee refuses to receive the thing bargained for—the vendor may consider it as his own, as if there had been no delivery, and recover the difference between the value at the time and place of delivery and the contract price; or he may sell it, with due precaution and diligence, to satisfy his lien for the price, and then he may sue and recover only the unpaid balance of the contract price; or he may consider it as the property of the vendee, subject to his call and order, and then he recovers the full price which the vendee was to pay."

It is clear that the contract for the sale of the wheat was executory, and that the title did not pass until Cook had done all he was bound by its terms to do; but after he threshed the wheat nothing remains for him to do but to deliver it at the

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landing. The offer to deliver and the refusal to accept were equivalent to performance by preventing it. The vendor was then free, as the case decides, to either treat the offer and refusal as a performance of the last act to be done by him, and as vesting the title in the vendee, and to consider the wheat as the property of the vendee, which he could, therefore, resell as the vendee's property by virtue of the vendee's lien, or set it apart for the vendee subject to his call and order; or, if he preferred, he could elect to treat the refusal to accept as a breach of the executory contract to buy, accept and pay and treat the wheat as not having been delivered and as still being his own. Whether he elected to treat the offer and refusal as the equivalent of performance, and resold the wheat as the vendee's property, or whether he elected to treat the vendee as having broken his contract to accept, does not appear from the report; the result would have been the same in both cases so far as the extent of recovery goes; in the former, he would recover as part of the contract price what in the latter he would recover as damages. When the vendor elects to treat the offer and refusal as a performance vesting the title, and further elects to assert his lien by a resale of the property on the vendee's account, he can not be required to set the property apart for the vendee and abandon all control of it, since that would involve the surrender of the lien under which the resale is to be justified, and would contradict the very conditions on which the right of resale is based.

Webber v. Minor, 6 Bush, 464, was an action to recover the balance of the agreed price for wood which Minor alleged he had sold to Webber and was to deliver to him at his brickyard; he alleged he had tendered and offered to deliver the wood to Webber at the brickyard, and that he refused to accept or receive it. The court held that though these averments were true, the fact "did not constitute, actually or constructively, a complete performance of the contract; for, conceding that a substantial compliance with his undertaking did not require that he should place the wood upon the brickyard against the will of the defendant, he should set it apart for the defendant and relinquish his own control of it at or as near to the place of delivery as was reasonably practicable. This would have

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been a constructive delivery of the wood, not merely an offer or tender of delivery. And as there would have remained nothing more for the plaintiff to do to vest the property in the defendant and render the sale absolute, he might then have recovered the contract price of the wood. But he was not entitled to a recovery to that extent upon the allegation and proof only of a tender or offer of delivery which, if true, neither divested him of the legal title nor the possession."

This is a clear recognition of the rule that no action can be maintained to recover the agreed price until the seller has done the last act to be done by him, and that this act must be such as eo instanti vests the property in the buyer. It decides moreover that if the seller intends to treat the property as that of the vendee and to sue for the agreed price as of goods sold and delivered, he must do something more than offer to deliver, even when there is a refusal to accept; that he must "set it apart for the defendant and relinquish his own control of it at or as near to the place of delivery" as is "reasonably practicable." Duckham v. Smith, 5 Monroe, 372, cited by the court, decides only that one who had agreed to deliver tobacco at the buyer's warehouse could maintain an action for the price "by averring the performance of the precedent condition on his part, or a tender of performance and a failure or refusal to receive it," but that in an allegation of performance he can not prove as an excuse for not performing that the buyer refused to accept. The text in Parsons on Contracts, cited in Cook v. Brandeis, is that the vendor may consider the goods as "the property of the vendee, subject to his call or order, and then he recovers the whole of the price which the vendee should pay."

It seems a little difficult to determine the nature or extent of this alleged duty to deliver at some other place, not agreed upon, that which the buyer will not permit to be delivered at the place that was agreed on. Must the seller, at his own cost, provide a place of storage more conveniently near that agreed on for delivery than the place where the goods were contracted for? If the last act done by the vendor which vested the title was to be done elsewhere than at the place of delivery agreed on, it may be that he would not be required to attempt a de-

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livery at any other than the agreed place, and that, if prevented from deliver there, he might set the goods apart where they are. But where the last act is to be done at the place of delivery, as where the vendor is to carry the goods to that place and to deliver them there, the rule announced in Webber v. Minor is that he must, as the equivalent of actual delivery at the place agreed on, leave the goods for the buyer as near that place as is reasonably practicable. What is the nature of this practicability? Does it include the fact that the seller was not in control of any place other than that where the goods were and, therefore, could not put them anywhere else without renting or trespassing? Does it include fitness of place as well as contiguity? Does it place on the seller all the risk of a jury's subsequent opinion as to its fitness? or as to the good conduct of the person with whom it is deposited?

In Cook v. Brandeis & Co. it was decided that the offer to deliver and refusal to accept vested the title in the buyer, and that the vendor might resell on the vendee's account. If the offer and refusal vested the title to the wheat in Brandeis & Co. the fact of ownership was established thereby, necessarily preceding the possibility of Cook's election whether he would resell and sue for the balance, or relinquish control and sue for the entire price. Cook was to carry the wheat to the landing; but it is not said that in order to vest title in Brandeis & Co. it was necessary for him to deliver there, being prohibited, or at any other place. His right to resell the wheat is predicated upon the fact that it was their property under lien; that it was their property is predicated on the fact that Cook was ready and willing to deliver at the landing, and that they refused to accept it when he offered to deliver it there, and that the offer and refusal were equivalent to performance.

If Minor sold to Webber the specific wood, agreeing to carry it to the brickyard, why did not the title vest in Webber by the offer and refusal without an actual delivery at or near the brickyard, as the title to the wheat under exactly the same circumstances vested in Brandeis & Co.? If Cook might treat the wheat as the property of Brandeis & Co. and proceed to resell, it was only because their refusal to accept his offer to de-

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liver had the effect of a performance vesting the title and also tendering surrender of the wheat upon payment of the price; for both of these things precede the right to sell: First, the act must be done necessary to pass the title; second, there must be a readiness and willingness to surrender the thing upon payment. Why was not Minor's offer as efficacious as Cook's? If it was so for the purpose of passing the title, why was it less so as an offer to surrender the thing sold? If Cook could deal with the wheat as the vendee's property and resell it, why might not Minor treat the wood as his vendee's property and make him pay the price he agreed to pay?

It seems to us that when the vendor is ready and willing to deliver the thing at the place agreed on, and offers to deliver it there, and the vendee notifies him not to deliver it there, and that he will not accept or receive it, the vendor is excused from delivering at the place agreed on, and does not incur, as the price of that excuse, an obligation to deliver the thing elsewhere than at the place where it is; that he may then treat it as his own property and recover the difference between its market value and the agreed price; or he may treat it as the vendee's property, and may resell it under his lien and recover the deficit, or may set the thing apart as the vendee's property, subject to his order, and recover the entire price. We understand this to be the rule applied in Cook v. Brandeis & Co. It does not appear in the report of Webber v. Minor that Minor did not continue after the offer and refusal to hold the wood as his own; it does not appear that he set it apart for Webber anywhere. In order to recover the contract price it must appear that the title has passed, and as the vendor may elect to retain it after the refusal to accept, it seems that there could be no recovery by Minor for that reason, and that it was not necessary to the case to say that if he had set it apart for Webber it would not have been sufficient unless the place was as near as reasonably practicable to that agreed on for delivery.

The answer of Wells, each paragraph being read in the light of the others, is this: He, without any authority, but supposing himself authorized, represented to Maley that, as agent of Best & Bro., he was empowered to buy the tobacco; that he

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bought it for them; that in a few days afterwards, ascertaining his mistake, he told Maley he had acted without authority, and that Maley might resell. The general rule is that one who makes a contract for another, claiming to be authorized by him to do so, is personally liable to perform the contract if he had no authority to make it for the other. There is no reason to doubt that Wells acted in good faith; but it was a very simple matter to know whether he was or not authorized to buy Maley's tobacco, and it seems that in such case the result of his mistake is that he must take the place of the persons whose agent he represented himself to be. The answer, therefore, presented no defense to the action. The instructions complained of could not have been prejudicial. The jury were required to find for Maley facts admitted by the pleadings. It was only on condition of such findings they were permitted to give a verdict which the pleadings themselves required no evidence to support.

The judgment is affirmed.

G. W. Adair and Campbell & Worthington for appellants.

Whittaker & Robertson for appellee.

BARKER v. WARREN.

(Filed June 6, 1884.)

1. Bills of peace and quia timet distinguished.
2. An injunction can not issue upon a petition showing merely that defendant is threatening to sell, without any right or authority, plaintiff's land. Such act would be a mere trespass which equity will not restrain unless it is shown that irreparable injury is threatened also.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Richards.

This appeal is prosecuted from a decree of perpetual injunction. The petition, after alleging title and possession in the plaintiff, stated: "That the defendant, M. S. Barker, has advertised that he will, on the 29th day of March, 1883, sell said property at the courthouse door in Louisville, and the said M. S. Barker threatened to sell said property on said date, and to execute a deed therefor to the purchaser at such sale, and

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threatened to put the purchaser in possession of said property, and, unless restrained and enjoined by this honorable court, the said M. S. Barker will proceed on the said 29th day of March, 1883, to sell the said property of the plaintiff, and will proceed to make a deed thereto, and will proceed to assist the purchaser at such pretended sale to take possession of the same. Plaintiff states that in all said matters the said Barker is acting and will act without any valid authority of law and without any authority from the plaintiff, but in opposition to and defiance of the plaintiff's rights."

By one of the counsel for appellee this is termed a "bill of peace," by the other a "bill quia timet," each one insisting that it is sufficient to maintain the decree.

A bill of peace will lie only, independent of statute, where the plaintiff has a right which may be controverted by various persons and by different actions, or where he has, after repeated and satisfactory trials, estabished his right at law, but is still in danger of new attempts to controvert it. "The obvious design of such a bill is to procure repose from perpetual litigation, and, therefore, it is justly called a bill of peace" (Story's Eq. Jur., section 853; Adams' Eq., 202; Holland v. Challen, 110 U. S. Rep., 19). The petition in the case at bar is in no sense a bill of peace.

A bill quia timet differed from a bill of peace in that its object was to prevent future litigation by removing existing causes of controversy as to the title, instead of the discontinuance of a prolonged and vexatious litigation. To maintain it the plaintiff must have, by the common law, the possession, and, except where the defendants were numerous, it is necessary that his title should have been established at law, or be founded on undisputed evidence or long continued possession (Holland v. Challen, 110 U. S., 21). But in every instance it was absolutely essential that the defendants should be asserting some interest in or claim to the property.

In almost every State this branch of equitable jurisdiction has been enlarged by statute. As early as 1796 an act was passed in Kentucky providing that "any person having both the legal title to, and possession of, land may institute a suit against any other person setting up a claim thereto," etc.

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In 1854 the legislature enacted a statute, entitled "An act to quiet the title to lands." It declared "that hereafter it shall, and may be, lawful for any person having both the legal title and possession of lands to institute and prosecute suits, by petition in equity, in the circuit court of the county in which the lands, or some part thereof, may lie against any other person setting up a claim thereto," etc. This statute was not repealed by the failure to incorporate it as part of the General Statutes. There is no portion of those statutes devoted to the subject of quieting titles. The act of 1854 is still in force in this State. But the petition before us does not bring the case within its provisions, as there is no allegation that the defendant is setting up a claim to the property. There is no averment that he is asserting any title whatever. Interpreting the statements of the petition fully and fairly, they amount to nothing more than that the defendant has advertised the plaintiff's property for sale, and intends to sell, convey and put the purchaser in possession of the same.

It is true courts of equity have, independent of statute, entertained jurisdiction to prevent a person from creating a cloud upon the title of another, as well as to remove a cloud already existing. In the latter instance the petition must state facts sufficient to show that the cloud does exist; in the former it must show that the threatened acts will be sufficient to create a cloud. Or, as the whole doctrine has been truly expressed, "there is no occasion to go into a court of equity in order to have that determined to be void and invalid which has no appearance of being otherwise" (Gilman v. Van Brunt, 29 Min., 272). This is the universal rule. (Pom. Eq. Jur., section 1399; Jenks v. Hathaway, 48 Mich., 538; Fonda v. Sage, 48 N. Y., 179; Wals v. Grosvenor, 31 Wis., 681; Cohen v. Sharp, 44 Cal., 30; 1 High on Inj., section 373, etc.)

In Cohen v. Sharp, supra, which was decided upon a demurrer to the complaint, the court said: "Where, therefore, the so-called cloud or adverse claim has not even the appearance of validity or substance, as where it appears on the face of the very documents or proceedings upon which the alleged claimant must rely, and which he must produce, that there is no legal validity in the claim, there is no ground for invoking the aid of a court, for there is in truth no injury and no ground

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for the apprehension of injury." In Jenks v. Hathaway, supra, it was said: "But the bill must in all cases show, by either description or some method showing why a description can not be given, in what way his title is wrongfully clouded. Nothing which is not calculated to cloud the title is any foundation for relief." Certainly nothing could be more transparently void and utterly worthless for any purpose than the sale and conveyance of one person's realty by another who asserted no interest in it, and claim to be acting by virtue of no authority. The cases cited where equity has interposed to prevent sales under judgment, execution and tax liens are in no wise analogous to this.

If the defendant contemplated all the wrongs alleged in the petition they could only have amounted to a simple trespass —he intends to place the nominal purchaser in possession of the plaintiff's property. It is true that equity will sometimes enjoin a trespass, but such is not the general rule (Trustees v. Berry, 2 J. J. Marshall, 484). In order to authorize the chancellor to interfere it must be accompanied by such peculiar circumstances as will make the injury irreparable at law. No facts of this character are alleged in the case at bar. The petition simply states that the pretended purchaser will be placed in possession. If equity could interpose in a case of this kind, then there would be no case of trespass beyond its reach. But we need continue our inquiry in this direction no further, since it is not insisted that the petition should have been sustained on this ground.

The motion to dissolve the injunction should have been sustained. Upon the return of the case the plaintiff should be permitted to amend if she wishes. Judgment reversed and the cause remanded for further proceedings consistent with this opinion.

Kohn & Barker and Russell & Helm for appellant.

R. W. Woolley for appellee.

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LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed June 11, 1884.)

1. Taxation—Appellant having failed to give in its property for assessments, information of that fact was given to the county court by the sheriff and an assessment made by that court. Held—The assessment is void because the act authorized revenue agents and not the sheriff to give the information.

2. Penalties—Appeals—In actions by the Commonwealth for a penalty appeal will lie from the county to the circuit court.

3. Limitation—An action to recover a penalty for failure to list property for taxation is embraced by the statute of limitation.

Appeal from Marion Circuit Court.

Also four cases of Same v. Same, appealed from Lincoln Circuit Court.

Opinion of the court by Judge Richards.

These are special proceedings for the benefit of Lincoln and Marion counties against the Louisville & Nashville Railroad Co. concerning the county taxes for the years 1876 and 1877.

1st. By what statute are they to be judged? The original chapter 93 of the General Statutes, which provided for a revenue agent to give information to the county court of persons who had failed to list their property for taxation, has been repealed (Acts 1873-4, page 67). The statute of February 23, 1874, which attempted to impose that duty upon the county attorney, has been decided unconstitutional (Pennington v. Woolfork, 79 Ky., 13). By an act approved April 29, 1880, which is now chapter 93 in Bullitt & Feland's last edition of the General Statutes, the legislature has again authorized the auditor to appoint revenue agents. This statute provides that where any person "has failed to give in his list, or a proper list of his taxable property," it shall be the duty of such agent "to give information of the same to the county court of the county where such list should have been given," and said court shall issue a summons and assess the property, with ten per cent. interest.

But in the cases before us the proceedings were not instituted upon the information of the reveune agents, but upon that of the sheriff. It is true the Court of Appeals said in McAlister v. Commonwealth, 6 Bush, 583, that it was wholly immaterial upon whose information the Commonwealth proceeded, but in

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the later case of Lincoln County Court v. L. & N. R. R. Co., 3 Ky. Law. Rep., 436, the same court has declared the assessment by a county court illegal, simply because the proceedings were not instituted upon the information of the proper officer. The doctrine last announced must control us. It follows, therefore, that the act of 1880 prescribing the duties of revenue agents can not be relied on to support the legality of these prosecutions. They were commenced solely upon the information of the sheriffs, and that statute confers no authority upon them.

Nor does the act of 1876 devolve the duty upon the sheriff to give the information (1 Acts 1876, page 78). While it provides for the taxation of railroads for county purposes, it makes it the duty first of the chief officer or agent residing in the county to list the property, and if he fails to do so, or there is no such agent or officer, it is then made the duty of the assessor to ascertain its value and list it. This act contains no provision whatever for the county court to make the assessment.

We find no authority anywhere for proceedings like those in the cases at bar to be founded on the information of the sheriff except in article 5, chapter 92 of the General Statutes. If it were a new question we might stop to consider whether this article was ever designed to embrace any but State taxes; or, if it was intended originally to include county taxes, whether the act of 1876 first making railroads liable for county taxes, and providing a mode of assessment and a penalty for a failure on the part of the company to list, would not exclude the idea that the mode and penalties prescribed in chapter 92 were applicable. But since the decision in Lincoln County Court v. L. & N. R. R. Co., supra, these are no longer open questions.

That case also decides that the act of 1878 did not repeal the article of the General Statutes in question, nor the act of 1876 —that they are still in force so far as county taxes against railroads for the years 1876 and 1877 are concerned. If the authority conferred by them to compel the assessment has not been repealed, it follows that those portions providing for penalties are not abrogated. The doctrine that a penalty can not be enforced after the statute creating it has been repealed has no application to the cases at bar.

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2d. Section 25 of article 5, chapter 92 of the General Statutes, provides that: "When it shall be known to the sheriff that any person has failed to give in a list of his taxable property in any year when it shall be liable for taxation, he shall report such person to the county clerk, to be dealt with, fined and taxed as delinquents reported by the assessor."

Delinquents reported by the assessor are to be fined not less than $100, and subjected to the payment of three times the amount of the tax upon their estate, except in cases where the court is satisfied they were not in willful default, in which event the clerk is simply to be directed to take a list of the taxable property, the delinquent to pay the cost of the prosecution. In the Marion county case the sheriff reported that the company had "failed to give a correct list;" in the Lincoln county cases he reported that it had "failed to list its property." The informations and summonses were sufficient under section 25, although they may not have been good under section 20, as interpreted in the case of Evans v. Commonwealth, 13 Bush, 270.

3d. Does any appeal lie from the judgment of the county courts?

In proceedings instituted by virtue of section 25 of the statute the court is authorized to impose the penalty of $100, and the triple tax provided for in section 20. They are, therefore, penal in their nature, and the defendant can prosecute an appeal under the provisions of chapter 2, title 9 of the Criminal Code (Evans v. Commonwealth, 13 Bush, 270). Nor is the company deprived of this right by the failure to impose the penalty in the Marion county case (Howell v. Commonwealth, MS. opinion, December 2, 1879). Where the case reaches the circuit court it is to be tried de novo. (Criminal Code, section 366.)

4th. What effect is to be given to the plea of the statute of limitation?

It was said in L. & N. R. R. Co. v. Commonwealth, 1 Bush, 261, that the right to assess or coerce assessments of taxes was not affected by the statute of limitations.

It is true the question was not presented in that case for adjudication, but it was subsequently referred to and approved in McAlister v. Commonwealth, 6 Bush, 583.

Yet prosecutions by the Commonwealth to recover a penalty

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for the violation of any penal statute or law and actions for a penalty are expressly embraced by the statute of limitations. Whatever is adjudged against the defendant in excess of the regular tax and costs must be in the nature of a penalty, against which the statute would run, commencing not later than the 1st of October of the year for which the tax was levied. It is unnecessary for us to decide whether the one year or the five years statute applies, as the prosecutions were not instituted within five years after the company's liability for the penalties first accrued. It follows, therefore, that the right to recover the penalties was barred, although the proceedings to compel the assessment could still be prosecuted. Under these circumstances the action of the court should be just what it would be where it finds the company is not willfully in default—it should simply adjudge the costs against the company, and direct the clerk to take the list of taxable property, certify it to the sheriff, to be collected as other taxes.

This being in substance the action of the court in the Marion county case the judgment therein is affirmed. But the judgment in the Lincoln county cases are reversed, and the causes remanded for further proceedings consistent with this opinion.

Rountree & Lisle, Wm. Lindsay, Hill & Alcorn and H. W. Bruce for appellants.

Spalding & Thompson, W. H. Julian and Carpenter & Miller for appellees.

NEW BOOKS.

Annual Report of Attorney General of the U. S. for the year 1883.

This volume contains some very interesting statements. It shows that it costs the government $3,000,000 annually to run its courts. Some of the fees paid special counsel reach very opulent figures. Mr. R. T. Merrick receives $27,500 in the Star Route cases, while two other counsel are paid, one $12,000 the other $20,000 in the same case. The deficiency in the appropriation made for attorneys was $110,000.

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A Treatise on the Writ of Habeas Corpus with Practice and Forms. By William S. Church; A. L. Bancroft & Co., San Francisco, 1884, pp. 702.

The latest treatise is always the best. This book may claim besides to supply an important need. There is but one other work on the subject of Habeas Corpus, that is Judge Hurd's, the latest edition of which is eight years old.

Mr. Church claims to have resisted the rhetorical temptations of the subject and to have wasted no lines in instituting comparisons between the present condition of liberty and that which existed when this writ was born, away back in "the night of English history." He has from the start settled down to the serious work of presenting the decisions of the courts upon it. He has done this in a very thorough way, and the practitioners and courts will find his work a valuable friend in their labors.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Negligence—

1. Willful—Rate of Speed—The jury was authorized to find that the running of a train at the rate of 25 or 30 miles an hour through a town of 2,500 inhabitants was willful neglect, and that the death of one crossing the track at a point near the depot, where he had the right to pass and where people were accustomed to cross, was caused thereby, although the signal may have been given of the approach of the train and that no stop would be made, and the fact that the person killed may have had a crazed intellect can not excuse the company, but rather renders the punishment inflicted by way of smart money the more deserved. L. & N. R. R. Co. v. Trentby, &c. June 14, 1884. Simpson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Wm. Lindsay for appellant; Halsell & Mitchell and E. W. Hines for appellees.

Personal Representatives—

1. Presumptions—Compensation—All presumptions are against an executor or administrator who fails to keep accounts and make settlements as required by law, and a court of equity will withhold from him all allowance for his services. Hamilton's Heirs v. Hamilton's Adm'r, &c. June 19, 1884. Fleming Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. Wm. Lindsay, Jas. M. Nesbitt and A. Duvall for appellants; B. D. Lacy and H. L. Stone for appellees.

Pleading and Practice in Criminal Cases—

1. Misleading instruction as to self-defense—The defendant being entitled, under the proof to an instruction as to self-defense, which had been given, an instruction to the jury that if certain facts existed the defendant could not avail himself of the right of self-defense, although sound law, was misleading, as it presented a rule of law applicable to the theory of the prosecution alone, and should not have been given, as the general instruction covered the whole ground, but when given its counterpart should have been given for the defense. Stivers v. Commonwealth. June 14, 1884. Bourbon Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Offutt & Ford, G. C. Lockhart, A. Duvall and D. W. Lindsey for appellant; P. W. Hardin for appellee.

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Trade-Mark—

1. Assets—Partnership—In the absence of express reservations or provisions as to a trade-mark when a partnership is formed, the law declares it to be a part of the assets of the partership on the ground that the trade represented by the trade-mark is carried into the partnership, and this rule applies to a second partner who takes the place of a former partner by purchase of his interest, without exceptions or reservations being made. Miller & Co. v. Cummins. June 19, 1884. Bullitt Cir. Ct. Opin. by Hargis, Ch. J., Ct. Ap., rev. Wm. Johnson and F. P. Straus for appellants. J. C. Wickliffe and W. B. Harrison for appellee.

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The Kentucky Law Reporter

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COURT OF APPEALS OF KENTUCKY.

CALDWELL v. PERRY, &c.

(Filed May 24, 1884.)

1. Separate estate—A woman may, by an agreement made directly with her husband, without the intervention of a third party, change the character of her property from general into separat estate.
2. Separate estate defined and mode of creating specified.
3. When a married woman having separate estate makes a note for her own benefit the presumption is that she intended to bind such estate, and that presumption is not destroyed by the fact that the payee of the note requires her to keep the property (on which the note is a lien) insured.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hines.

Mrs. Inman, an unmarried woman, being the owner in fee of certain real estate and contemplating marriage with Alfred Perry, entered into a written agreement with Perry by which it was provided that all the property, both real and personal, belonging to Mrs. Inman should be held by her after marriage

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as her separate estate. The intention to create a separate estate being expressed in this language: "It being intended that the said Mary A. Inman shall hold the said property as her separate estate in the same manner as if she were sole and unmarried."

The agreement was executed and witnessed in the presence of two persons and after marriage acknowledged and placed to record as required in case of conveyances of real estate. Subsequently to this Mrs. Perry (previously Mrs. Inman) jointly with McCoy purchased a drug store and for one of the deferred payments executed her note, with McCoy, for $600. This action was brought to subject the real estate mentioned in the agreement to the payment of this note, and from a judgment dismissing the petition this appeal is taken.

The sole question is whether this agreement operated to change the character of the general estate in Mrs. Inman into separate estate in Mrs. Perry. A separate estate is that from which the dominion and control of the husband is excluded, and from which he is to derive no benefit by reason of the marital relation. It may be acquired or created by conveyance, devise or gift from another, or by relinquishment by ante-nuptial contract of the husband's marital rights, by deed of husband and wife after marriage where the conveyance is to another for the express purpose of reconveyance to the wife, with exclusion of the husband's rights in or to the property. In such case the property revests in the wife, loses the character of general estate, and is as much separate estate as if the title had been originally derived by the wife from a third party, with like limitation as to use and alienation. If the character of the estate may thus be changed by indirection there appears no reason why it may not be done directly through conveyance by the husband in which he, in a solemn and notorious manner, makes relinquishment of his rights, which is all that is designed and effected by the conveyance and reconveyance to and by the third party.

In this case the execution and the putting to record of the agreement is in effect a conveyance to the wife of all interest that would otherwise have been in the husband. From this conclusion it does not follow, nor is it necessary to decide, that

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the contract confers upon the wife the right to trade as a feme sole. It affects the character of the estate, however, rendering the property liable for her debts, contracted for her benefit, when the credit is extended on the faith of the property, and when such contracts are made the presumption is that the feme intended to bind her separate estate. That presumption is not destroyed by the fact that the payee required the property purchased to be kept insured. That was nothing more than requiring security for the payment of the debt which would not destroy the payee's right to look to the separate estate of the feme covert for payment, as there is nothing else in the record to indicate that the credit was not extended on the faith of the separate estate.

Judgment reversed and cause remanded, with direction to subject the real estate mentioned in the petition to the payment of the debt.

W. F. Browder for appellant.

A. G. Rhea for appellees.

KINCAID, &c. v. MAGOWAN, &c.

(Filed June 19, 1884.)

1. Mines—Timber—The owner of land may sell the soil to one and the mines underneath it or timber upon it to another, or reserve them by an exception in the deed to himself; such exception implicity includes the right to enter on the land and cut the timber or work the mines.

2. Joinder—Where plaintiffs claim under the same title they may sue jointly several defendants who also claim under that title, although they claim different parts of the land.

Appeal form Menifee Circuit Court.

Opinion of the court by Chief Justice Hargis.

This case was decided upon a motion to compel the plaintiffs to elect which cause of action and which of several defendants named in the three separate paragraphs of their petition they would prosecute; and upon a general and special demurrer interposed after plaintiff's election under protest to prosecute the second and third paragraphs. From the judgment compelling plaintiffs to elect, and sustaining the general demurrer, they

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appealed, and now present for our decision the questions of law determined by the judgment.

In each paragraph of the petition it is averred that the plaintiffs, the only children, grandchildren and heirs at law of Edward Kincaid, deceased, are the owners in fee and hold the legal title to and are in the actual possession of 22,000 acres of land, except certain portions previously sold, lying in the counties of Menifee and Wolfe, which descended to them from their ancestor. The description by metes and bounds, courses and distances is set forth in their petition and their title papers filed, which consists of a patent to Dean Timmons, dated 4th January, 1796, and signed by Patrick Henry, then governor of Virginia; a deed from Thomas Duckham to Plummer and said Kincaid, and a conveyance of his interest by Plummer to Kincaid, under whom all of the defendants, either mediately or immediately, claim to hold. There is no deed filed from Timmons to Duckham, but it is alleged that the latter was the owner at the date of his conveyance to Plummer and Kincaid. The first paragraph alleges that Wm. Gray, who is a nonresident, claims 500 acres of the land under a deed purporting to have been made by Duckham as agent of Kincaid; but that Duckham was not his attorney in fact, and had no power or authority from him to make the conveyance or deed, which is exhibited and is not accompanied by any written or recorded power to make it. The second paragraph substantially states that the appellees, Magowan and others, as heirs of J. P. Magowan and Thomas Turner under them, are falsely setting up claim to and giving it out in speeches that they own and have the right to possess and to sell portions or interests in the land, and the minerals under and timber upon parts of said Timmons' patent boundary, which belongs to the plaintiffs, and are thus impairing their rights and injuring their titles.

By the third paragraph it is alleged that John M. Clayton is setting up claim to the land without right, etc., substantially as charged against the Magowans and Turner.

1. The plaintiffs' title is alleged in each paragraph to have been derived from the same source, and each of the defendants in all of the paragraphs are charged with claiming adverse to the same title, and asserting ownership of different portions of

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the same body of lands, embraced by that title; and the question is whether the defendants were properly joined. In the case of Woolfork, &c. v. Ashby, &c., 2 Met., 289, this court decided that tenants in common or joint owners claiming under the same title and dependent on the same questions to establish their right to the land could maintain an action against several defendants jointly, although they held and claimed separate parcels and had no joint possession. This rule is supported by the cases Abney v. Barnet, 1 Mass., 107, and Smith, &c. v. Shackleford, 9 Dana, 453. Newman on Pleading, page 133, says: "If two or more persons be in possession, each occupying separate parcels of the same tract of land belonging to the plaintiff, it will not be necessary to sue them separately, but they may all be sued jointly," and again: "If the plaintiff owned the whole tract there would be no misjoinder by reason of their being all sued in one and the same action."

If persons holding separately can be sued jointly there seems to be no good reason for not applying the same rule where the defendants are not in possession, but claim from the same source separate interests against the common title and possession of the plaintiff. This rule will prevent a multiplicity of suits about the same title which the plaintiffs have sought to quiet in this action. We are, therefore, of the opinion that the joinder of the defendants was proper and the judgment compelling plaintiffs to elect erroneous. There was no demurrer to the first paragraph, and, therefore, its sufficiency in law is not before us. Were a demurrer sustained to it an amendment might make it good, and at the proper time that opportunity should be given, if the paragraph be demurrable.

2. Whether the petition states a cause of action depends upon the right of the plaintiffs on the facts alleged to maintain this character of suit, which is in the nature of a bill quia timet, and on the validity of their title to the minerals and timber under the conveyances made to their ancestors by Duckham after he had conveyed the soil to the ancestor of the appellees Magowan.

It is alleged the plaintiffs are the owners of the legal title and in possession of the lands or of the minerals and timber, which are really the subject of the action. The authorities in

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this State, as well as the statute on the subject, clearly authorize the action which the plaintiffs have adopted. In the case of Armitage v. Wickliffe, 12 B. Monroe, 488, the court said: If he had the possession and the legal title, he had a right to institute his suit against any other person setting up a claim to it or any part of it. The statutes of 1796 (1 volume, Statute Law, 294) expressly authorize a suit to be brought in such a case, and we have no doubt of the right of a person under such circumstances to maintain a suit in a court of chancery, independently of the statute, upon well established principles of equity." That was a bill quia timet. The statute of 1796 was re-enacted by the act of March 9, 1854, entitled "An act to quiet the title to lands" (2 Stanton, 102, and revived by the act March 17, 1856, General Statutes, 846). Hostile claims which affect the market ability of title furnish sufficient grounds for an action of quia timet in behalf of the owner of the legal title who is also in possession. The principle on which this action is authorized has been uniformly maintained by this court (Beard v. Smith, 6 Monroe, 505; Hiatt v. Calloway, 7 B. Monroe, 180; 12 B. Monroe, 612; 4 Monroe, 442; 7 Bush, 49). The case of Scott v. Means has no application to an action like this. In that case there was no allegation of actual possession in the plaintiff, and it was clear that the defendant was in possession, which was alleged to be unlawful, besides there is a great difference between a bill of peace and a bill quia timet.

The main question presented by this record has never been decided, so far as we can learn, by the courts of this State. Whether an owner of land can sell the soil to one, the timber to another and the minerals to a third person, and by ordinary deed invest the vendees with the several interests so severed, and yet possessed as to render their respective estates enjoyable, is a question of some moment, but, as we understand it, capable of practical solution.

By deed of February 2, 1842, Duckham conveyed a part of the Dean Timmons survey of 22,000 acres to James P. Magowan, the ancestor of appellees Magowan, but made the following exception from it: "The said Duckham reserves to himself all minerals and mines in the bowels of the earth in said boundary

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of land, and the one-half of the timber included in said boundary of land, and mill seat on said creek."

On the 21st of November, 1842, he sold and conveyed to Magowan another part of the Timmons survey, in which the following exception was made: "It is, however, understood that the said party of the first part reserves one-half of all mines and minerals in the bowels of the earth, and one-half of the timber on said land, and all the timber on the south side of the river, except on Swift Camp."

Subsequent to these conveyances Duckham, on the 9th day of June, 1843, sold and conveyed to Kincaid and Plummer (with two other tracts) the tract of land patented to Dean Timmons for 22,000 acres, in consideration of $1,500, "with a deduction of what the said Duckham has sold and made deeds to prior to this date." At the time this deed was made by Duckham he owned no interest in the Timmons survey except the mines, minerals and part of the timber and mill seat, and, it may be, some part not embraced by the conveyance to Magowan. It is contended that the conveyance to Kincaid and Plummer, who subsequently conveyed his interest to Kincaid, did not invest them with the mines, minerals and timber excepted from the deed to Magowan.

Duckham sold and conveyed to Kincaid and Plummer all of the land he owned in the Timmons survey, and that meant the lands and all rights thereto and interests therein other than a chattel interest that he owned.

Since the Virginia revision it has been the law of this State that any interest in or claim to real estate could be disposed of by deed or will, and according to the proper construction of this deed the general alienation of the land conveyed all the right and estate that Duckham could lawfully convey, and we are of opinion, if the mines, minerals and timber are part of the land and the subject of severance and separate alienation, that he conveyed them to the appellants, whose averments must be considered as true for the purposes of this decision. The deed is broad enough to cover all of the grantor's title to any and all parts and interest which he owned in the Timmons survey, and as it must be construed more strongly against him there can be but little room if any to doubt that he intended

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by the general language used in the deed to convey, and that the grantees should understand that he was conveying all interest, which, under the statutes of frauds, could alone be conveyed in writing, that he might or did own in the Timmons survey. The exceptions covered the property rights he had theretofore conveyed. And the previous conveyances embraced only the soil, leaving him the owner of mines, minerals and timber, attached to and part of the land, and subject to the same rules of inheritance and alienation as the land itself. So we can see no good reason for saying that his deed for all the land he owned in the Timmons survey should not cover the minerals and timber he had excepted and owned in and on the soil conveyed to another, any more than that the minerals and timber on any other portion of the land did not pass by the deed which excepts the interests of others, but does not except or reserve any of his interest or rights in the Timmons survey. When we look to the deeds to Magowan we find that they are only for the soil, the surface interest in the realty, but not for the mines, minerals or timber, which are as much a part of the realty or land as the soil itself. Having sold the soil to the Magowans, excepting the mines, minerals and timber as stated above, and thereafter conveyed all of his interest in the land, whether of beneath or above the surface embraced by the Timmons survey, the only question remaining is, were the exceptions from the Magowan deed valid, and did Duckham have the right in law to convey the title to those excepted interests to the plaintiffs' ancestor?

Collier on Mines, page 10, says: "The property in minerals, and the right to search for them, may be vested in other persons than the owner of the fee, by alienation, by prescriptions, or by custom. The right to raise or dig minerals or use mines may be alienated without conferring the property right to the minerals until they are severed from the soil. So not only the use, but the title to the mine or mineral itself in an unsevered state, like trees before they are cut or identified may be alienated, the requisites of the statutes of frauds, which include every sale of real estate or lands, being complied with." For the same work says, page 10: "An estate in minerals is considered an estate in land, and is transferable only under the

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same restrictions, whether conveyed with or without a conveyance of the adjacent soil; if conveyed without the land, no amount of nonuser will, it seems, be a relinquishment by the owner of them in favor of the owner of the land, or constitute adverse possession on his part, so completely separate are the estates." Bainbridge on the Law of Mines and Minerals, Dallas' American Edition, declares the law to be that property in mines may form and be held as a distinct inheritance and possession, and that mines as held are "held either by grant or exception, or by virtue of acts of ownership which have produced an adverse possession against the owners of the surface," and that "the severance of mines is usually effected by exceptions in deeds (as in this case) which transfer the freehold in the surface and reserve the mines." He says further, that "there are frequently even distinct ownerships, though generally for limited periods only, in different descriptions of mineral and in different deposits or strata of the same kind of mineral. Thus one person may be entitled to the iron, and another to the limestone; one seam or stratum of coal in the same lands may belong to a third person, another distinct seam to a fourth owner."

This law is the result of sound reason and necessity, and in accord with our free allodial titles and ownership in this State, where there is no restrictions which forbid this class of alienation.

There are many decisions in this country supporting and following the texts from which the above quotations are made (See the case of Armstrong v. Caldwell, 23 Penn. St., 287, and authorities therein cited). In the case of Caldwell v. Copeland, 37 Penn. St., 430, the general doctrine and mode of showing title to mines, etc., is fully discussed and well stated. The court said: "It is apparent, from that part of the charge of the learned judge which is recited in the first error assigned, that he made the title of Caldwell to the coal in dispute to depend altogether on the actual possession which Caldwell had maintained of the surface, and not at all upon his occasional entries to take coal, of which there was evidence."

And proceeded to hold that "this actual possession of the surface carries with it the actual possession downward perpen-

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dicularly through all the various strata. The actual possession, therefore, was in the plaintiff.

"This proposition would be unquestionable if there had not been a severance of the title to the mine right from that of the surface by the deed of the 27th of May, 1831, Caldwell to Greer. But it is not true that after such a severance, whether by reservation or grant, the possession of the surface is possession of the underlying mineral. That mines may form a distinct possession and a different inheritance from the surface land has been long settled in England, as may be seen by reference to the cases cited in the two opinions heretofore delivered in this case, and reported in 7th Casey, 476 and 482. (Also Barnes v. Manson, 1 Maule & Sel., 84).

"It is a common occurrence in mining districts there not only that the ownership of the soil is vested in one person, and that of the mines in another, but there are frequently distinct ownerships of the minerals in the same land. Thus one person may be entitled to the iron ore, another to the limestone, a third to one seam or stratum of coal, and a fourth to a distinct stratum.

"Title to any of these minerals, quite distinct from the title to the surface, may be shown by documentary evidence; or, in the absence of such evidence or in opposition to it, title to them may be made out by proof of possession and acts of ownership under the statute of limitations.

"The acts of ownership, however, which constitute possession and confer title, must be distinct from such as are exercised over the surface (Tymnitt v. Wynne, 2 Barn. & Ald., 554; Cullen v. Rich, Bull N. P., 102. And see the same case under the name Rich v. Johnson, 2 Strange, 1142). So entirely is a mineral right, after severance, a claim to land, and, therefore, not an incorporeal hereditament that title to it can not be acquired by prescription. Prescription lies only for incorporeal rights, not for land. It may confer a right to work a particular mine, as it may confer a right of way across another's estate, or a right to fish in another's waters, but the title to mine itself, like the title to land, must be made out by documentary evidence or under the statute of limitations. (Wilkinson v. Proud, 11 M. & W., 33, and the cases therein cited.)"

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In many of the original colonial charters mines of gold, silver and precious stones were reserved to the crown, in which, according to the laws of England, the right to silver and gold mines was reserved or remained notwithstanding a general description in a grant by the king. (Plowden, 336; 1 Blackst. Com., 294.)

Whether this crown right devolved to the confederation is a question of some doubt, yet the Continental Congress asserted it by statute in at least one instance, which was afterwards repealed.

Congress has often reserved mineral rights in the public lands which, from time to time, have been permitted to be taken up by settlers or granted to the States. In this State, however, no reservation has been made or asserted to the minerals against the title of the absolute owners, who derive title from the State as the original and ultimate possessor of the property in all lands within the State. We, therefore, see that the doctrine of severance of minerals and mines with the qualities of land still inhering in them, subject to the laws of alienation of lands and contracts in reference thereto, has not only British law to support it, but also rules which have been applied to the public domain and adopted in different States for the regulation of sale, purchase, conveyance, title, possession and use of these severed and severable interests in lands, whose value is thus greatly enhanced for the several uses to which they may be applied by persons of different skill and dissimilar occupations. And it is not true that these rules of law which bring into varied use the different and separable elements of the landed property of the citizen are nonenforceable or calculated to produce confusion by reason of their refinement or impracticability. For a sufficient answer to this claim is to be found in the general rule of law "that when anything is granted all the means of attaining it and all the fruits and effect of it are also granted." Illustration: "Thus, by the grant of ground a way to it is also granted, if there be no accustomed way. By a grant of trees there is also passed a power to cut them down and to take them away. In like manner a grant of mines also gives the right to work them unless there is some positive restraint in the language of the grant itself."

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So every man who buys may understand, and is presumed to know, that every former exception or reservation lawfully made is accompanied by that implied condition which enables the owner of the thing, right, privilege, property or permission to enjoy it in a reasonable and substantial manner, without any unnecessary injury to the rights or property of the subsequent holder, who takes subject to such exception or reservation, whether absolute or qualified, with the right of entry or use to be exercised in a reasonable way. Wherefore, the judgment is reversed and cause remanded, with directions to overrule the demurrer and the motion to elect.

Judge Lewis dissenting.

Wm. Lindsay and S. F. J. Trabue for appellants.

Peters & Tyler, H. C. Lilly and Thos. Turner for appellees.

KIRK v. WILLIAMSON.

(Filed June 9, 1884.)

1. Where a patent accurately describes land, with the quantity of acres and names of the owners of any exclusions, it is not void for uncertainty. (2.) Where the Commonwealth once patents land and receives payment therefor, it can not afterwards issue a second patent, although the land should have again become vested in the Commonwealth.

Appeal from Martin Circuit Court.

Opinion of the court by Chief Justice Hargis.

The appellee, Williamson, holds a patent for 2,200 acres of land issued by the Commonwealth of Kentucky on the 29th day of July, 1856. After the usual form of grant, the patent describes the 2,200 acres by metes and bounds, courses and distances, and at the close of the description contains an exclusion in the following words: "Prior claims 300 acres for William H. McNew; 500 acres for John Deskins; 100 acres for Johnant Cecil; 50 acres for Benjamin Maynard; 120 acres for Lewis Deskins."

On the 3d day of September, 1881, the appellant, Kirk, entered and surveyed a considerable parcel of said 2,200 acres, locating his entry on the parts not within any of the exclusions, and now insists that he had the lawful right to do so, on the

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alleged ground that the patent owned by appellee Williamson is void for uncertainty. In the first place the patent is not void for uncertainty because the land is accurately surveyed and the exclusions specify the quantity of acres and the names of each of the owners of the portions excluded (Madison's Heirs v. Owens, Littels' Sel. Cas., 281). Second, if the patent were void for uncertainty the appellant would have no right to enter, survey or carry into grant any part of appellee's patent boundary because it appears from the record that the entry and survey which preceded the patent were duly made, and the Commonwealth having received payment for this land, and issued a patent for it in good faith once, could not again permit it to be appropriated under chapter 109, General Statutes, even if the title had, in any way, become again vested in the Commonwealth. (Section 3, chapter 109, page 819, General Statutes.)

Then there is another provision of the last section and chapter named that forbids and renders absolutely void every entry, every survey, and every patent made or issued under that chapter, so far as the entry, survey or patent embraces lands previously entered or surveyed or patented. The object of this provision of the statute is to discourage the nefarious practice of searching out defects in patents, and then knowingly entering the lands which had been honestly entered and surveyed and paid for by the patentee; and also to destroy the power of junior entries or surveys or patents, to cloud the entries or surveys or patents (either or all) which had been honestly and legally made and returned as required by law. If a person enters land and pays for it, and complies with the statute in having the entry and survey made in the time fixed by law, no other person has any right either to enter, survey or patent the same land; and whenever the Commonwealth lawfully patents the land once, it can not for any cause patent the same land again as vacant or unappropriated land, for that would breed confusion and contention. The statute says so in these words: "No land shall be subject to appropriation under this chapter (109) * * * which has been once patented, and the title of the same has in any way become again vested in the Commonwealth." Either of the facts admitted by this record, to wit, of the entry, survey or patent would be sufficient on which to

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base a judgment sustaining the caveat filed by appellee. Judgment affirmed.

James S. Stewart for appellant.

J. S. VanWinkle for appellee.

SUPERIOR COURT.

YOST v. COMMONWEALTH.

(Filed May 14, 1884.)

1. Indictment—Selling liquor—An indictment which charges defendant with selling whisky to divers persons charges many different offenses, for each sale is a distinct offense and should be set out in a separate paragraph.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Bowden.

By a law which went into effect March 6, 1882, the sale, loan and gift of spirituous, malt and vinous liquors in the town of Allensville, in Todd county, are prohibited.

At the May term, 1883, of the Todd Circuit Court the grand jury returned two indictments against the appellant, numbered 361 and 363. November 23, 1883, he was tried under that numbered 361 and was fined; the next day he was tried under that numbered 363 and was again fined, having pleaded the conviction on the previous day in bar, in addition to the plea of not guilty. These indictments were exact counterparts, each accusing the appellant "of the offense of unlawfully selling spirituous liquors by retail in the town of Allensville, committed as follows, to wit: "The said Yost heretofore, to wit, on the —— day of ——, A. D., 188—, in said county of Todd, did unlawfully sell spirituous liquors, to wit, whisky by retail to divers persons unknown to the grand jury, in the town of Allensville."

This appeal seeks a reversal of the second judgment.

If, as argued for the Commonwealth, the indictment charged only one sale made to joint purchasers it was erroneous to instruct the jury that they could convict on the proof of a sale made to Small alone, since the sale proved could not have been the sale alleged. Each sale is a complete offense, and in the

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case supposed the defendant would have been convicted of an offense for which he was not indicted.

But the indictment does not charge a single sale made to joint purchasers. It charges that on a day not specified the defendant sold whisky to divers (i. e., to different) persons, and it, therefore, imputes as many offenses as may be comprehended by the word divers. Separate indictments could have been preferred for each of these offenses, or all of them could have been charged in separate counts in the same indictment. In either case a judgment of conviction or acquittal would have protected the defendant from further prosecution. The indictment would have charged the commission of a distinct offense in the one case, and of several distinct offenses in the other. It is the proper function of an indictment to allege a single offense and the particular acts which constitute it, with such identifying circumstances as will enable a person of common understanding to know what particular offense is meant. But the matter now considered is not whether the sales alleged are sufficiently identified to enable the defendant to prepare for his defense; but it is whether several different acts, constituting as many different offenses, can be charged in an indictment otherwise than in separate counts, whereby they become separate charges of separate offenses as fully as if set out in separate indictments.

It could not be claimed that under such an indictment a conviction could be had for more than one offense. If the defendant were to plead guilty the court could not know how many sales were admitted by the plea; and hence could not render a judgment for more than one penalty, though the very words of the indictment show that many sales had been made, and many penalties had been incurred. It is essential to a good indictment that its allegations shall be made with "such degree of certainty as to enable the court to pronounce judgment on conviction, according to the right of the case." It seems clear that it should be so certain as to enable the court to pronounce judgment on a plea of guilty. This is not like a case in which a single offense is properly laid, with a general statement that the defendant did similar acts on divers other days; then the general statement may be rejected as surplusage

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and leave the single charge good. But here the several sales are alleged with equal force, and with equal vagueness; no choice can be made among them; one is as good as another. A confession by the defendant would concede everything charged; so that while he would confess many offenses—indeed every offense which could have been proved under the indictment—the court could not render a judgment in accordance with the confession, nor would it be possible to tell for what particular offense the judgment should be.

Doubtless if the grand jury knew the name of the purchaser they should allege it; ordinarily where several things must concur to constitute an offense the specification of these acts will go far towards identifying the offense charged; so that the mere fact that the name of a third person is not given, because not known, may still leave the offense intended sufficiently distinguished from other offenses.

Nor are we disposed to say that even in cases like the present, when the single act of sale is itself the offense, there can be no valid indictment unless the purchaser's name is given, though it allege that the grand jury do not unknow his name or who he was. In such case it may be a sufficient protection to the defendant that he is entitled to an acquittal if it appears that the purchaser proved at the trial was not unknown to the grand jury, the result of which proof would be that the act charged was not the act proved. Nor do we now undertake to say whether this proof is to be made by the Commonwealth, in order to identify the sale charged, or by the defendant, in order to show it is not the same; adjudged cases do not agree in regard to this matter.

But in this case the same grand jury found two indictments against Yost at the same term, each alleging sales to different persons unknown, and both covering exactly the same period of time. The witness, Small, who proved the last case, was either known to the grand jury as the purchaser, or he was not so known. If he was so known, then the sale made to him was made to a person known to the grand jury, and was not one of the sales for which the defendant was indicted; and, therefore, he could not have been convicted on that indictment for that sale. If he was unknown to the grand jury as a purchaser,

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and had been produced as a witness on the first trial, his evidence of a sale made to himself would have secured a conviction on that trial. So the defendant could then have been convicted for any other sale made to any other unknown person which the Commonwealth might have been then able to prove. An indictment which permits such results is too general.

An indictment should charge some particular offense, and the act or acts which constitute it. If it is alleged to have been done on a specified day the prosecution is not limited to the time laid, but may prove the act charged if done at any time within the period prescribed as a bar; but it is limited to the proof of the act charged. The indictment in this case does not charge any particular offense or any particular sale, but is in substance a drag net, prepared to catch all fish coming in its way. In effect it is rather an inquisition after all possible offenses than a prosecution for any particular offense.

Our conclusion is that the indictment was insufficient, for the reason that it is not direct or certain as to the particular offense intended, its indeterminate allegation being that the defendant made different sales to different persons; but that, if the indictment were sufficient, the former conviction was a bar to a prosecution under it, if Small was an unknown purchaser, and, if known, that there was no evidence whatever of the offense alleged.

The judgment is reversed.

W. L. Reeves for appellant.

J. M. Porter for appellee.

PENCE v. COMMONWEALTH.

(Filed July 18, 1884.)

1. What is necessary to constitute one a wholesale dealer within the meaning of the local option law.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Bowden.

The appellant was indicted and convicted for selling whisky

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in civil District No. 1 in Madison county, where the law, popularly called the local option law, was in force. The evidence was that he was a distiller, and that at his residence he sold to Miller five gallons of whisky of his own manufacture, at one sale, which was drawn from a barrel, put in a jug and taken away; there was also evidence that he was a wholesale dealer in whisky. Miller resided in the civil District No. 1.

The court gave these instructions to the jury:

"1. If they believe from the evidence beyond a reasonable doubt that the defendant, in this county, and before the finding of the indictment, and in the town of Richmond, sold to W. H. Miller any spirituous liquor in September, 1882, you should find him guilty and fix his punishment at not less than $25 and not more than $100.

"2. If the whisky sold to Miller, if any was sold to him by the defendant, was as much as five gallons, and said sale was made in good faith by defendant as a wholesale dealer, you should acquit him, provided you believe that the liquor sold to Miller was sold to him for the purpose of being retailed by him; but, if sold to him to be consumed by said Miller, you should find defendant guilty."

The third instruction was in regard to reasonable doubt, and the fourth that it was admitted that the local option law applies in Richmond.

It is provided by section 7 of the "act to regulate the sale of spirituous, vinous or malt liquors in this Commonwealth," known as the local option law, that its provisions "shall not apply to any manufacturer or wholesale dealer who, in good faith and in the usual course of trade, sells by the wholesale." By section 3 of article 2, chapter 106 of the General Statutes, as amended by an act of March 20, 1876, a distiller has the privilege of selling at his residence any spirits of his own manufacture in quantities not less than a quart, but not to be drunk on the premises.

The first instruction directed a conviction if the jury believed that the defendant sold any liquor to Miller in Richmond, though he may have sold it as a manufacturer or wholesale dealer in good faith and at wholesale, unless it is supposed that the court meant that there was no evidence respecting these matters to be submitted to the jury, which the second

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instruction indicates was not intended, inasmuch as it directs an acquittal though the jury found the sale of five gallons, if they also found other matters specified. Taken by itself the first instruction seems to us clearly erroneous. The second instruction does not in terms purport to modify it, but to constitute a separate and independent direction, though in conflict with it. Together they devolved upon the jury the necessity of determining the nature, extent and conditions of this conflict. Was it intended that the jury should not consider the specified matters of defense unless the quantity sold was as much as five gallons, and that, if it was less, the sale alone demanded conviction, but in that case why did the first instruction order a conviction if defendant sold "any spirituous liquors," without stating that a quantity less than five gallons was meant? But on what authority could it be said that the defendant had no right as a manufacturer or wholesale dealer to sell a smaller quantity than five gallons? Does not an effort to harmonize the two instructions require this proposition as the basis of instruction No. 1? Even if it were conceded that the second instruction is to be taken as modifying the first, and that the two together would relieve the first of the objection suggested, we are of the opinion that the proposition as modified is not correct.

1st. It assumes as matter of law that in order to constitute a wholesale dealer the quantity of each sale must be not less than five gallons. There is no such statutory prescription. The provisions of the act of Congress which arbitrarily fixes that quantity as the minimum of wholesale transactions manifestly can not be relied on as a part of the local option law. In the absence of a statute giving a legal definition to the word wholesale, with regard to a particular commodity, it is a question of fact whether, according to the usual course of trade in that commodity, a given transaction is to be regarded as a wholesale or retail. These are relative terms. Etymologically considered, it might be said that the sale of a thing as prepared and put up by the manufacturer, to be sold as put up, without subtraction, is a wholesale transaction, but if only a part of the thing is sold, if there is (as the word retail implies) a cutting or severing of the thing as put up, the sale is a retail

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transaction. It is, however, a very hazardous rule to interpret legislative language by reference to the obscure etymology of words. In its active life business loses sight of philological proprieties. It divides things by the rule of utility, and seizes on apt words to designate the divisions. But even if the meanings of the words wholesale and retail are taken from the dictionary, it is still a question of fact as to the minimum quantity of whisky, or of any other fluid, or of anything made entire, as nails, pins and needles, which constitute a whole package as originally put up. With respect to such matters, it seems clear that the condition in which the wholesale dealer chooses, for safety or convenience, to keep his stock is unimportant. A dealer in grain may keep a hundred thousand bushels in an elevator; a dealer in liquors may keep them in casks of immense capacity, but it could not be said that the sale of 50,000 bushels of the grain out of one elevator, or the sale of 1,000 gallons of wine out of one cask would, therefore, be a retail dealing. What constitutes a wholesale dealer in a given commodity, and what constitutes a wholesale transaction, if made by a wholesale dealer, are questions of fact to be proved by evidence and found by the jury. It is "the usual course of trade" which determines the answers. It may be that only a minimum quantity is considered in deciding whether a dealer is wholesale or retail, and it may be that the question as to the purpose of the purchaser, as whether buying for personal use or for resale, may be an element. But we do not think it can be assumed as matter of law, as the second instruction seems to assume, that the sale of no quantity, however great, is a wholesale transaction unless the purchaser buy sas a dealer to resell, the instruction going somewhat further by requiring that the purpose of the purchase should be to sell again at retail.

If the defendant was shown to be a manufacturer of, or wholesale dealer in, whisky; if it was shown that he sold to Miller five gallons of whisky made by himself (it being important that the whisky was of his own make only as regards his right as a manufacturer to sell and not with reference to his right as a wholesale dealer); and if it was shown that such sales were recognized by dealers, and understood by the trade,

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as wholesale transactions, the sale made by the defendant was presumably lawful, and he should have been acquitted unless the jury found that the sale was not made in good faith.

The purpose of the local option law is to exclude the local opportunity of getting liquors to be drunk. Previous and general legislation was content to keep those disposed to dissipation from meeting and making central stations of vice except at licensed places. Penalties were imposed only when the liquor was sold to be drunk, or was drunk on the premises when sold or on adjacent premises; the law did not seek to preclude any one from an opportunity to buy and take home. While the local option law is intended to render it difficult to get whisky to be drunk as a beverage, and thereby to prevent its use, while in furtherance of this object it disallows all retailing, it yet permits the manufacturer and wholesale dealer to sell, unquestioned as to all sales made in the usual course of trade, and in good faith; yet if they make a fraudulent use of this right, with intent to frustrate the purposes of the local option law, the act, which would otherwise be innocent, becomes guilty by reason of the intent. If the defendant sold the whisky to Miller, intending thereby to furnish him indirectly, under the guise of a wholesale transaction, with whisky to be consumed by him in drinking, the purpose of the law imputes to the defendant a sale of whisky, by way of anticipation, by the drink. He is not permitted to sell in any quantity with an intent to supply the very facilities for private dissipation which it is the object of the local option law to suppress. The law treats him as a conspirator against the local peace.

But it is not material whether Miller was or was not a retail dealer unless as matter of fact that may determine whether the sale was a selling by wholesale; nor is it important, except in the same limit, whether Miller bought to resell or to "consume." There are many ways of consuming whisky besides drinking it. Miller may have bought the whisky "to be consumed by him" in a manner in no way inconsistent with the policy of repressive legislation.

The judgment is reversed and the cause remanded, with directions to grant a new trial and for further proceedings.

C. F. & A. R. Burnam for appellant.

C. H. Brown for appellee.

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SNOWDEN v. LEIGHT.

(Filed January 19, 1884.)

1. Landlord and tenant—Condition precedent—Where a landlord covenanting to keep the tenant in quiet possession during the term, another thereupon guarantees the rent, Held—The covenant is a condition precedent and in a suit on the guaranty its performance must be averred.
2. Consideration—All written promises purport a consideration.
3. Guaranty—A contract of guaranty can not be supported by a consideration already executed between the principal and creditor.
4. Landlord's lien—The guarantor in this case was not released by landlord's failure to attach property which the tenant was selling off the premises.

Appeal from Jefferson Court Common Pleas.

Opinion of the court by Judge Richards.

The appellee, Mrs. Leight, leased to Mrs. F. T. S. Ayars a house and lot in the city of Louisville, Ky., for one year, and covenanted in writing "to keep the tenant in quiet possession of the premises during said term." In consideration thereof the lessee bound herself to pay as rent $125 on the 15th of each month. The appellant signed the following obligation endorsed on the back of the lease:

"In consideration of the time given for the payment of rents specified in the within lease, I bind myself as the security of Fannie T. S. Ayars for the payment of the same to the extent of three hundred and seventy-five ($375) dollars should the said Ayars fail to pay the same at maturity.

"Louisville, Ky., September —, 1879."

This action was commenced by the landlord against appellant Snowden, alleging that he, by said writing, "did, in consideration of the extension of time for the payment of rents as specified in the said lease, agree and bind himself as surety of Fannie T. S. Ayars to guarantee the payment of said rent to the extent of $375, should the said Ayars fail to pay the rent as specified in said lease at maturity." For a breach of this covenant the plaintiff alleged that neither the tenant nor the guarantor had paid the rent for the last two and a half months of the term.

The appellant's undertaking was to guarantee, not simply the payment of the rent for the first three months, but the

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payment to the extent of $875 of the arrears for any portion of the term.

But the agreement to pay the rent was only in consideration of the leasing, coupled with the landlord's covenant to keep the tenant in quiet possession during the term. This covenant being a condition precedent, the plaintiff should have alleged its performance. Her failure to do so rendered her petition defective, and the demurrer should have been sustained.

It is true the petition stated that the tenant paid the rent up to the 1st day of July, 1880, "from which time to the 15th of September, 1880, she used and occupied plaintiff's said house as plaintiff's tenant under said lease." But this was not an averment that she had been kept in "quiet possession" of the entire premises.

But it is a well settled rule of pleading that where the petition omits an allegation necessary to the cause of action the existence of this omitted fact will be placed in issue by an answer denying it. Conceding that the above-mentioned defect in the petition was cured by the denials in the answer, still the burden of proof remained precisely where it would have been had the issue been regularly formed. The plaintiff must prove that the tenant was kept in quiet possession just as if this condition precedent had been alleged in the petition and denied in the answer. Nevertheless the court ruled that the burden was on the defendant, and, without the quiet possession being established, gave a peremptory instruction for the plaintiff.

The petition alleged that appellant executed the guaranty "in consideration of the extension of time for the payment of the rents as specified in the said lease." This is consistent with the writing upon which the action is based. The lease does not state that the time for the payment was once fixed and then extended, but it does show upon its face that the monthly payments were to run or extend through the entire term. If this "extension of time" was given in consideration of the guaranty it will be sufficient to support the cause of action.

But the appellant answered, denying that he had executed the writing in consideration of any extension of time; denied that

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there had been any extension of time, and alleged that the lease had first been executed and that "afterward," without any consideration, he signed the guaranty.

Contracts to be valid must be founded upon a valid consideration which, at the common law, the plaintiff was required both to allege and prove. There was but one exception to this rule, viz.: Contracts which imported a consideration, embracing sealed instruments, bills of exchange and negotiable promissory notes. But by statute in Kentucky all written promises are elevated to the dignity of sealed instruments, and must, therefore, be held to purport a consideration, and the burden is on the party attacking it.

It is a well-settled rule that "where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract" (Brandt on Suretyship and Guaranty, section 9). It was, therefore, competent for the defendant in this case to prove that before he signed the guaranty sued on the plaintiff had executed the lease upon the terms therein specified, and that neither his guaranty nor the promise thereof was any part of the inducement for the extension of time for the payment of the rent. It is expressly provided by statute that the consideration of any writing "may be impeached or denied." (General Statutes, chapter 22, section 8.)

Before the tenant left the premises she sold at public auction the personal property upon which the landlord had a lien for the rent. Appellant claims that as the landlord knew that this property was being sold, and as its value was greater than the amount of the rent in arrear, the guarantor is released. If the creditor has a lien on the property of the principal for the payment of the debt, and by any act of his, or omission to act by him, the property is diverted from that purpose, or lost as a security, the surety or guarantor is pro tanto discharged. Thus, where a principal gave his creditor a chattel mortgage on property sufficient to pay the debt, which the creditor failed to record, thereby losing his lien, the surety was held to be discharged. Or where a pledge is placed in the hands of a cred-

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itor, which he afterwards returns to the debtor, who sells it to an innocent third party, the surety is released. But mere passiveness by the creditor in not instituting proceedings against the debtor will not, in the absence of a binding stipulation in the contract of the surety or guarantor, rendering activity necessary, release the surety or guarantor. "The cases which deny the necessity for diligence as against the principal, may perhaps be reconciled with those which exact it as to the collateral securities for the debt, by the difference between the remedies which the creditor holds under the contract against the parties and those which he derives from the parties against third persons. The latter are regarded as trusts requiring diligence, while the former are held by the creditor exclusively for his own benefit, and need not be exercised unless he thinks proper." (2 White v. Tudor, Lead. Cas. in Eq., part 2, page 1902.)

The lien which a landlord has for rent is given him by statute. He holds it, not as a trust from the parties, but by operation of law. He can assert this lien by proper legal proceedings or not, as he thinks proper, without releasing the guarantor.

In the case at bar the rent was not due when the sale was made by the tenant. The landlord could have sued out an attachment and levied on the property upon which the lien existed, but she was not bound so to do. By merely neglecting to take this step she has not lost any right she previously had against the appellant.

Judgment reversed and the cause remanded for further proceedings consistent with this opinion.

N. T. Crutchfield for appellant.

Goodloe & Humphrey for appellees.

YARBROUGH, &c. v. COLLEY.

(Filed February 20, 1884.)

1. Assignment for creditor's benefit - Sureties—Where there has been an assignment for the benefit of creditors a claimant against the estate must first obtain judgment and return of "no property," and show that the trustee under the assignment has wasted the assets before he can maintain any

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action against the sureties on the trustee's bond. (2.) A claimant may sue the trustee to settle the estate as soon as he qualifies.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Reid.

In the case of sureties on executors' and administrators' bonds creditors can not, in the first instance, sue the sureties on the original demand against the decedent. In Clark v. Commonwealth, for Nendley, 5 Monroe, 104, it was held that the creditor must first obtain judgment against the personal representative to be made of assets; then, on nulla bona returned, bring a second suit to convict him of a devastavit before the sureties could be sued on their bond.

In Hobbs v. Middleton, 1 J. J. Marshall, 176, it was held that after a judgment had been obtained against an executor or administrator in his representative capacity, and execution has been returned thereon unsatisfied, he and his sureties on his official bond may be sued at once, without a separate suit being first prosecuted against him alone, and that all will be liable if a devastavit on his part is proved by any evidence satisfactorily showing the fact. It is true such judgment never did bind or conclude any one but the fiduciary suffering it, as to assets, and the sureties were left free to plead the facts whether he had received assets or not, and now under section 31, chapter 39, General Statutes, the fiduciary stands in the same attitude as the sureties.

As an executor or administrator can not be charged de bonis propriis until a suit has been brought against him in order to establish the demand and ascertain the disposition of the assets, and as the bond is only intended as an ultimate security against a devastavit, the devastavit ought to be established before any action can accrue upon it, it seems, from analogy of reasoning, that no action should be allowed on the bond of the trustee in cases of voluntary assignments against the sureties until the creditor has first established his claim against the trustee and shown his right to the trust fund. The covenants of the bond executed to the grantor as required by the statute are that the trustee will faithfully, in proper time, discharge all the duties imposed upon him by the conveyance or the laws of the land. These duties are to reduce the trust property and

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pay it to the creditors according to the priority of their demands, and any creditor can compel their performance and have the trust administered and ascertain to what part of the trust fund he is entitled. When this is ascertained, and not before, a prima facie liability, as against the sureties at least, is established, and they may be sued on the bond. Their liability is measured by the interest the creditor has in the assets of the assigning debtor, and this is the measure of damages for a breach of the bond. If the estate proves insolvent, paying only a certain per cent. upon its settlement, the sureties, in case of the default of the trustee, could only be held for that portion of the assets that the creditor would be entitled to under distribution. Such is the legal effect of the undertaking of the sureties and their liability ought not to be enlarged. If the trustee fails to wind up the trust the statute allows any creditor to institute an action in equity for its settlement, and he may do this as soon as the trustee qualifies. He can thus find out what is coming to him on his individual demand, and if he fails to realize it out of the trust property he can fall back upon the bond. Until he shows himself a creditor; that the assignor had assets; that the trustee received them; that there was enough to discharge his demand or so much thereof, after paying debts of a higher dignity; that the trustee had wasted them; there is no injury done him and no breach of the sureties' covenant, which is designed to ultimately secure the assets to the satisfaction of the creditors. The wisdom of these principles is clearly illustrated by the facts of the present case, where the creditor waited nearly seven years before he even sued on the bond—where it is pretty evident some arrangement was made by which the assignor retained the property and undertook to settle with his creditors, appellee among them, who received from the debtor a part of his claim and had transactions with him resulting in payments on his demand—where the trustee handled none of the trust funds and paid no debts. Such dealings might tend to delude the sureties and hazard their rights; but whatever might have been the arrangement between the assignor and trustee, if the creditor did not agree to it, his remedy to ascertain what was his out of the trust assets was complete, and until this is done

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and a default fastened on the trustee the creditor alleging assets and even a waste of them, can not maintain an original action against the trustee and his sureties on the bond.

Judgment reversed and cause remanded, with directions to dismiss the petition.

Jno. A. Mayes, Boones & Stanfield and E. W. Hines for appellants.

Robinson, Robbins & Moorman for appellees.

MOORE v. SETTLE.

(Filed May 2, 1883.)

1. Gaming—Married woman—The wife has no right to sue to recover from the winner money lost by her husband at cards, although a statute authorizes any person to bring such action.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bowden.

I do not think the appellee's action can be maintained, first, because, being a wife, she can not sue alone; second, because she has no interest in the subject-matter. These two matters will be discussed together.

"In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property in which he refuses to unite, she may sue or be sued alone. In all other actions by or against a wife she and her husband must join or be joined as plaintiffs or defendants." (Civil Code, section 34.)

These are rules of procedure whereby a wife may enforce an existing right; they do not prescribe a method whereby the right may be created. They imply a primary right in the wife before an action is commenced, and merely present the means by which a remedy may be procured.

The appellee had no primary right to the penalty before she began her action. It was the act of suing by which she acquired the right (Fox v. Estell, 7 Monroe, 553). This is obvious on the face of the statute. It, therefore, seems that as the right to sue in her own name depends on her previously having a primary right to be protected, it can not be maintained in

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this case, where, before her action was begun, she had no right whatever; the right to the penalty being the product and result of the act of suing. There is a plain difference between the right of any one to sue, and the right to the penalty which legally results from the exercise of the right to sue. The former gives no interest whatever; the latter does, entitling him who sues to recover the penalty. As a wife's right to sue in her own name is exceptional, and is predicated on an interest existing when she sues, whether her action concerns her separate estate or her general property, it seems that when, as in this case, she has no interest before the action is commenced she can not sue alone by virtue of the provisions of the Code, and by the act of suing create the interest.

But, independent of this general objection, which goes to all of the cases in which she is allowed to sue alone, there is a particular objection with reference to each separate case.

1st. Her action is not against her husband, either in form or effect. She has no right against him, nor does she seek any remedy against him. He has no right or interest in the subject-matter; he can not recover the penalty, nor can he even prevent any one from suing to recover it, except by suing himself. True, he is precluded by her recovery; but if she can sue alone, she stands as "any other person" would, and it is too plain for discussion that her husband would not be a necessary or even a proper party to an action by a stranger to recover the penalty. Though precluded, it is not by force of the judgment operating on and adjudicating her right, actual or potential, in the subject-matter, for he has none; but he is precluded from asserting a right entirely different—the right to recover her lost money—and he is precluded, not by the terms of any judgment that may be rendered, but by the terms of limitation in the statute, which provides that while he may have five years within which to sue for her lost money, yet if any one after six months sues for the penalty, he can not thereafter sue. Her right to recover the money is for six months exclusive; after that it is conditional, and is barred by the act of a third person in beginning an action in good faith to recover the penalty. The moment the penal action is begun the plaintiff in that action acquires a right to the penalty, and in

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that moment the loser's right to recover his loss is ended. It is not the decision of a court that puts an end to it; the plaintiff in the penal action by his own act of suing does it. It were mere nonsense to make him a defendant in order to notify him of the nonexistence of his right; that it had been superseded and destroyed by the action then begun, in which he had no interest. The loser's right and that of the plaintiff to recover the penalty can not co-exist; they are not adverse, but are successive.

2d. Nor is it an action concerning her separate estate. Such estate can arise only by force of the determining will of some one other than the wife, or by reason of some prior equity in her, such as that of settlement, or by express statutory provision. It is in derogation of marital rights, and is upheld to the exclusion of those rights by reason of the intention of some one other than the wife that it shall be so, or by reason of the natural right to be provided for out of her own general property in proper cases. The wife can not create it for herself by her mere will and election that it shall be her separate estate. As wife she is under the law of the marital relation, and she has no more power to suspend or displace that law as it affects property than she has to emancipate herself from its personal control. If it were conceded that the mere rules of pleading would allow her to acquire presonal property by prosecuting an action to recover a penalty, the judgment, when rendered, would be subject to his control, and the money, when gotten, would belong to him; there is no statute which withdraws from the marital law money so gotten; she can not by her own will change that law which gives it to her husband when reduced to his possession, and gives him the right to reduce it.

It seems plain that the statute making the wife's earnings her separate property does not embrace money received by her in any other capacity than that of one employed to labor. It provides that "the wages and compensation of married women for service and labor done and performed by them shall be free from the debts and control of the husband, and their employers are allowed to pay such wages and compensation directly to such married women, and payment to them shall be a full acquittance and discharge of the employer." This statute has a purpose much too limited to include a penalty. Its purpose is

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indicated by such unmistakable words as employer, wager, service and labor, pay, acquittance. Nor can she acquire a separate estate, that is to say, a separate right to recover the penalty by reason of the husband's consent. He has no right to the penalty; he can not sue for it; and no action can be prosecuted to recover it which can be maintained only by reason of his consent. That would subvert the statute. Besides, if the right to recover the penalty could become her separate estate by force of his consent, it would be necessary to allege his consent, and he would then be a necessary party to answer to that allegation. In that case she would not be the "any other person" who may under the statute sue at his own will. It seems clear that by "any other person" was meant one who could by his own will, by his own personal act of suing, preclude the loser against his will; one who has the legal right to sue to recover a legal penalty; one who is under no disability forbidding him from doing the act necessary to be done in order to acquire a right to the penalty, such as coverture or being an alien enemy.

The capacity of a wife to sue alone is the result of the existence of separate estate. When a title is vested in her, and the conditions are such that it is withdrawn from the operation of the law which gives it to her husband, the law emancipates her from legal personal disabilities with regard to that interest so that she may be free to deal with her own. It does not first emancipate her in order that she may, being free as an unmarried woman, acquire a separate estate by force of her own will. Were this so, it would have only been necessary she should have elected to be free from the personal disabilities of marriage, and then she would have secured a personal status enabling her to get, hold and convey without let or hindrance; she would thus have changed the law of marital rights at pleasure.

I do not believe that personal election is recognized by our law as one of the methods whereby a wife can secure a separate estate.

It seems to me it is an assumption to say she may sue because the act of suit is an initial step respecting her separate estate, for the question to be decided is whether she has the legal power to take that step. If she has not, then she has no

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power to acquire a separate estate in that way, even if it were conceded that she may, by force of her personal election, create such estate by an act which she can perform. She may arrest a fugitive, if strong and wary enough, but I deny that the reward becomes her separate estate merely because she did the act. In order to decide that she can acquire a separate estate in the penalty it is necessary to decide first that she can legally do the act by which it can alone be created; but, in order to decide that she can do that act, it is necessary to decide first that it is a separate estate. It seems to me this argument goes 'round the circle.

3d. Nor can her right rest on the husband's refusal to join in an action respecting her general estate—not merely because of the general objection heretofore made, that she has no interest till the suit is actually begun—but for the particular reason that while a husband is under obligation to unite with her in protecting and recovering her interests, he is under no obligation whatever to unite with her in any money-making scheme, whether by the usual methods, or by the more unusual one of suing to recover a penalty, and, therefore, he is not to be treated by the courts as a recusant because he declines to risk his money, in lawyer's fees and costs, upon the issue of such an enterprise. This would apply to the wife of any man, whether he was the loser or not. If it is the loser's wife, it is very difficult to see that the husband is in default in refusing to join in an action which, if it can be maintained at all, destroys his right to recover his lost money. Will a court say he was not doing his duty as husband in refusing to give up his personal right in order to enable her to recover the penalty? On the contrary, will it not deny the wife's right to maintain an action by which, in order that she may acquire a right, she necessarily precludes an existing right in her husband? Will it impute to the legislature the intention of placing it in the power of the wife to subserve her interest by destroying his? But she can't sue alone because he refuses to join, if they could not prosecute a joint action in her right; if they should sue, the petition that would show her right to recover the penalty would show his right to recover the lost money; in the event they pray that the penalty be recovered by them in right of the wife as her general property, the prayer should be denied

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because the legal effect of granting it would be to permit the husband to recover the penalty itself, which he has no right to recover, for, from the moment the judgment is rendered in favor of husband and wife, it is subject to his control.

If a married woman may sue for the penalty because she is "a person," there is no reason why the wife of the winner might not sue him. That action would be in form and in substance against her husband. It would seek a judgment for money which he would have to pay. It would come within the very letter of the Code. The legislature might provide that the loser's wife could sue for the penalty, without permitting a result so deplorable as the right of the winner's wife to secure by her action all the money her husband could win; a result that would practically repeal the statute because, being in effect her husband's partner, she would be in a far better position to know when to sue than would any of the loser's creditors, and our knowledge of men justifies the assertion that she would in ninety-nine cases out of a hundred be easily ahead of the loser. It must be remembered that this statute, though embracing all winners, is aimed specially at the professional gambler. It is no answer to this criticism that the person who sues must sue in good faith. That means only that the plaintiff must be prosecuting the action with the intention of making the defendant pay, and not with the intent to enable him to escape suit. If his wife can sue, it would not affect her right if it were shown that the defendant was willing for her to recover, or even desired she should. The defendant's state of mind can not defeat the plaintiff's cause of action. Nothing would defeat her but evidence that she was suing for his benefit; if it did not appear that she did not intend to make him pay, or that she sued with the intent to give him back the money, she would succeed. Yet, while her separate estate is not his, it is his living. If it is supposed that since he, as husband, would succeed to her separate personal estate on hand at her death, that possibility would itself preclude his wife from recovery, for very much stronger reasons would it preclude the wife of the loser; for he certainly could not be permitted to

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gain any interest in a penalty in this indirect way which he could not gain by his own suit; so far from repressing gaming, it would make losing money far more profitable than winning it.

These practical considerations seem to me not without weight. While they do not induce the construction which I have given the statute, they tend to make me satisfied with it. If we had a statute, such as there is in Massachusetts, conferring express power on a married woman to prosecute in her own name, for her own use, any action in tort, and also another statute, as there is there, that a penalty should be recovered by an action in tort, I should still hesitate to say that even such explicit legislation contemplated conferring on a wife the right to sue for a penalty, when her act of suing extinguished a right, vested in her husband, to recover his losses—my doubt would not arise on a question of pleading, but on matters involving the peculiar relation of husband and wife, the harmony of which the entire history of our law shows it has been its chief care to preserve. But we have no such statutes, and, therefore, the Massachusetts decisions can not, in my opinion, have any value in determining the question here.

I think the statute meant that any other person capable of suing might sue. It is not a code of pleading. It means to refer that matter to the statutes of pleading. An alien enemy is a person, but he could not sue; an infant is a person, but he could not sue otherwise than by a guardian or next friend, nor could a lunatic, otherwise than by his committee.

My opinion is that the judgment should be reversed.

Warren Montfort for appellant.

O. B. Hallam for appellee.

Note.—The foregoing dissenting opinion by Presiding Judge Bowden of the Superior Court was not ready for publication at the time the opinion of the majority of the court was published (4 Ky. Law Rep., 972), and when prepared was held up awaiting the opinion of the Court of Appeals in the same case, but was omitted by mistake from the last number of the Reporter. For opinion of Court of Appeals see 6 Ky. Law Rep., 58.—Ed.

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COMMONWEALTH v. MESSMORE.

(Filed April 30, 1884.)

1. Judgment in a misdemeanor case may be reversed on appeal by the Commonwealth, notwithstanding the act which provides that such appeals are reversible for errors of law prejudicial to defendant.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Bowden.

On the Commonwealth's appeal from a judgment in favor of Messmore on an indictment for obstructing a public highway this court reversed the judgment and directed a new trial. Messmore now moves the court to correct the opinion and mandate "so far as the same direct a new trial to be granted by the Hickman Circuit Court for the following reasons:

"Because no new trial can lawfully be granted the Commonwealth in any case.

"On an appeal from a judgment of not guilty no new trial can be awarded. Section 353 of the Criminal Code was repealed by the act of March 4, 1880."

Article 1, chapter 1, title 9 of the Criminal Code relates to felony cases; article 2 to misdemeanor cases.

As to felonies: Section 334 confers appellate jurisdiction, limited by section 339, providing that there shall be no reversal of a judgment for the defendant if it would bar a further prosecution; by section 337, providing that in such cases, where there can be no reversal, the appellate court may, on the Commonwealth's appeal, declare the law for future cases, and by section 340, providing that on the defendant's appeal, where there may be a reversal, the court shall reverse for errors of law prejudicial to the defendant. This last section was amended March 4, 1880, so as to read "the judgment shall be reversed for any error of law appearing on the record when, upon consideration of the whole record, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby." There could be no reversal on the Commonwealth's appeal, and, therefore, section 340, in both its original and amended form, properly speaks of the rights of the "defendant."

As to misdemeanors: Section 347 confers appellate jurisdiction, limited by section 352, prohibiting a reversal if the pun-

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ishment might be by imprisonment, and by section 353 restricting the court to errors of law prejudicial to the appellant, whether the appeal is by the Commonwealth or by the defendant. Subject to these limitations, section 347 conferred on the court jurisdiction to affirm or reverse on the appeal of either party. By a separate act of March 4, 1880, section 353 was amended by the same language as that used in amending section 340. As this section as amended provides that the judgment shall be reversed for errors of law prejudicial to the defendant, it is inferred there can be no reversal on the Commonwealth's appeal, since the errors of which it would complain could not have been prejudicial to the defendant.

Unless specially authorized by statute a court has no jurisdiction to declare the law in any case which it has not jurisdiction to decide. Its utterances are law only in cases where the matter to be decided requires them, and they are law because they are required. All else the court may say is mere dictum. Section 347 confers this peculiar power on the Court of Appeals in felony cases; but no such power is given by any statute in misdemeanor cases. If, therefore, the amendment has the effect suggested, this court has no longer any jursidiction whatever on the Commonwealth's appeal, and the amendment, instead of being, as it purports, a mere modification of section 353, has the same effect as if it had declared that it repealed all of section 347 so far as it conferred jurisdiction on the Commonwealth's appeal; all of section 350, directing how its appeal should be taken, and all of section 354 in regard to fees when there should be a reversal on its appeal. Purporting merely to limit a jurisdiction theretofore conferred, it would be so extended as to destroy the jurisdiction itself.

It is obvious that the amendment to section 340 is beneficial to the Commonwealth, and is an added restriction upon the right to reverse on the defendant's appeal. In order to a reversal it requires that the error of law shall not be merely potentially prejudicial, as might be suggested by the simple fact that the defendant was tried under the influence of an illegal rule, but that it shall be such as to satisfy the court, upon a consideration of the whole case, in connection with the errors

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of law, that it was in fact prejudicial or, from the nature of the case, presumably so.

It is difficult to believe that by the same words amending section 353 in regard to misdemeanors the legislature intended to enlarge the rights of defendants by enabling them to escape through the errors of the trial court; to abandon a traditional policy which prevents such escape; to repeal, by the mere implication from a word, a jurisdiction conferred long ago, carefully preserved, and beneficially exercised; or that it contemplated such variant results, limiting the area of reversible ground in felony cases, and giving up to defendants in misdemeanor cases fields of reversal long held by the State.

The use of the word "defendant" in amending section 340 was proper, for only he could obtain a reversal. The same word was inadvertently used in amending section 353, the fact being overlooked that in cases to which that section applied the Commonwealth also might obtain a reversal. The word should have been appellant, as it was in the original.

But if we may not read the word defendant as if it were appellant, it must mean a defendant who is an appellant, and, therefore, if we adhere literally to the section as amended it can not be made to apply to an appeal by the Commonwealth. If the defendant is acquitted no error could have been prejudicial to him; but the amended section refers only to such judgments as are the outcome of errors prejudicial to the defendant, and, therefore, can not relate to an appeal in which the possibility of such errors does not exist. If the section as amended had been as original form, either this conclusion must have been reached or the court must have disregarded sections 347, so far as it conferred jurisdiction on the Commonwealth's appeal, 350 and part of 353, as relating to a case that could not legally exist. Remembering that jurisdiction is conferred by section 347 to try, affirm or reverse, as well on the appeal of the Comommwealth as of the defendant, and that section 353 as it stood was only a limitation on that jurisdiction, we must concede that an entire repeal of that section would have relieved the jurisdiction of all limitations prescribed by it, and that a partial repeal of it would have resulted in a partial relief. If, therefore, there has been substituted for it a new section which by its terms can apply only to appeals by

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the defendant, the jurisdiction on the Commonwealth's appeal is not affected by it in any degree; though probably the same rule would be applied to such appeals by analogy and for the sake of uniformity.

Whether we untie the knot in this way or cut it, by treating the word defendant as if it were appellant, the result is the same; an amendment, plainly designed to limit the exercise of an established and useful jurisdiction, is not converted into a destroyer of it; all that the legislature purposed is accomplished, and that is saved which it did not mean to throw away.

The motion to correct the opinion and mandate is overruled.

C. H. Thomas for appellant.

White & Reeves and G. W. Griffey for appellee.

PERRY v. COMMONWEALTH.

(Filed January 21, 1884.)

1. The particularity required in framing an indictment for gambling under the statute against gaming.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Richards.

The indictment under which the appellant was convicted charged that he did "suffer and permit a game and games, to wit, poker, euchre, seven-up and other card games and games of dice to be, and which were then and there played in a house and on premises then and there in the possession and under the control of him, the said Perry, at and upon which said games money, United States currency of value, and other property were then and there bet, won and lost."

The following is the statute under which the indictment was framed: "Whoever shall suffer any game whatever, at which money or property is won or lost, to be played in a house, boat or flat, or on premises in his occupation or under his control, shall be fined from $200 to $500 for each offense."

There is but one crime denounced by this statute, although it provides against its commission in various ways. The offense intended to be suppressed is that of suffering gambling;

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those committing this offense are to be punished, whether the gambling is in a house, boat or flat, or on premises in their occupation or under their control, or whether money or property is bet, lost and won.

But while there is but one statutory crime embraced by this law, still an indictment drawn thereunder must allege in what manner the offense has been committed, and this must be done with such particularity as will definitely apprise the defendant of what he is accused. For instance, it would not be sufficient to aver that the defendant had suffered gambling in his house or on his premises, for this would be no notice to him of the locus in quo; nor would it suffice to allege that money or property was bet, lost and won on the games, for the defendant could not "be presumed to have been able to make an available or effectual preparation for defense against so vague and uncertain accusation." (Commonwealth v. Perrigo, 3 Met., 5.)

But where the indictment charges him with suffering games of chance in his house and on his premises, upon which both money and property were bet, lost and won, the defendant need not be in doubt as to what is necessary for his defense. He knows that if the gambling was in his house that it was necessarily on his premises, for the term "premises" embraces houses. Under an indictment alleging that the gambling was permitted on premises in the possession or under the control of the defendant, the Commonwealth could prove that the offense was committed in a house.

The defendant at bar is, therefore, not prejudiced by the insertion of the words "in a house," for they are included by the more comprehensive phrase "on premises then and there in the possession and under the control of him, the said Perry." By such an indictment he is also apprised of the charge that both money and property were lost on said games. Can it be said that the Commonwealth must limit herself to the games at which money alone was bet? or to games at which property alone was lost? Most assuredly not. If the accused has permitted games at which both money and property were bet, lost and won, it is proper that the indictment should charge the offense to have been so committed. (Commonwealth v. Crupper, 3 Dana, 466; Commonwealth v. Fraize, 5 Bush, 325.)

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For instance, could it be claimed under section 2 of the statute against injuries to the person, that an indictment was bad for duplicity which charged that the defendant did "willfully strike, stab, thrust and shoot another?" It is true if he simply struck him under the circumstances denounced in the statute the law would be violated, and so if he stabbed him, or thrust him, or shot him, but there is no rule of pleading which prevents the defendant being charged with them all in the same indictment. And under an indictment which charges the accused with having done all the Commonwealth is entitled to a conviction if she succeeds in proving that he did either.

So in the case at bar, where the defendant is charged with permitting games of chance to be played in a house, and on premises in his possession and under his control, at which games money and property were won and lost, it was proper for the court to tell the jury that it was sufficient for the Commonwealth to prove that either money or property had been won and lost. The reason underlying the rule of pleading which forbids the indictment charging the acts in the alternative because not apprising the defendant, which he is to defend himself against, does not extend to instructions in the disjunctive given under an indictment framed in the conjunctive. It is not necessary for us to decide whether it was error for the court to instruct the jury in the alternative in regard to the place of the gaming, as the appellant could not in any event have been prejudiced thereby, for all the witnesses who testified to any gaming located it in a house.

"Naming the game was not at all essential to the validity of the indictment" (Commonwealth v. Branham, 3 Bush, 1), and the statement in the indictment that several-named games were permitted does not render it invalid.

Nor can the accused require that the names of the persons who gambled shall be alleged (Commonwealth v. Lampton, 4 Bibb, 261; Commonwealth v. Crupper, 3 Dana, 466). As well might a defendant charged with keeping a tippling-house demand that the names should be given of those who got the liquor.

Wherefore, the judgment is affirmed, with damages.

Carroll & Barbour for appellant.

J. S. Morris for appellee.

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LOGAN v. DAVIS & KELLAR.

(Filed January 30, 1884.)

1. **Jurisdiction—Appeal—The "amount in controversy" which determines the jurisdiction on appeal is, where the plaintiff is appellant, the amount he sued for and failed to recover; where defendant is appellant, the amount of the judgment against him.**

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Richards.

In cases like the one at bar the jurisdiction of this court is regulated by the following statute: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than $100, exclusive of costs."

The expression "value in controversy," has the same signification as "matter in controversy," or "matter in dispute," which two latter phrases were held in Harman v. Lynchburg, 33 Gratt., 57, to be of the same impute, the court adding: "By 'matter in dispute' is meant the subject of the litigation—the matter for which the suit is brought and upon which issue is joined."

So in Pennie v. Continental Life Ins. Co., 67 N. Y., 297, the plaintiff claimed $1,083. The court say: "The general term ordered judgment for the plaintiff for $795.59, from which the plaintiff appealed to this court, and the question is whether it is appealable under chapter 322 of the laws of 1874. We think it is not. The object of the act was to limit appeals to amounts in controversy exceeding $500. Although the judgment exceeded $500, yet the sum in controversy is considerably less than that amount. The only controversy in the case is whether the counterclaim of about $200 should be allowed. Ordinarily the amount of the judgment is in controversy. In this case it is not. The amount of the judgment is not contested—the only contest is whether the judgment should be increased about $200."

And Wiley v. Brigham, 81 N. Y., 13, and Brown v. Sigommy, 72 N. Y., 122, are of similar import.

The Supreme Court of Iowa said, in Marlow v. Marlow, 56 Iowa, 300: "The defendant admitted the execution of the note, and tendered the entire amount due and all that was claimed

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thereon, and the costs accrued up to the time of filing his answer. The entire amount in controversy, as shown by the pleadings, was the attorney's fee, alleged in the petition to be $76.35. The amount in controversy, as shown by the pleadings, being less than $100, no appeal lies" (Young v. McWaid, 57 Iowa, 101; Succession of Espinola, 21 La. Ann., 264.) And the Court of Appeals of Kentucky decided, in Myers v. Brookover, MS. Op. June, 1856, that although the petition claims more than $100, yet if the sum controverted by the answer is less than that amount the appellate court had no jurisdiction. (Myers' Code, page 258.)

But even though the value in controversy in the lower court exceeds the amount necessary for an appeal, the appellate court will not have jurisdiction unless the required amount is still in controversy in the appeal. For instance, in 1858 the Court of Appeals had jurisdiction where the value in controversy was $50. A plaintiff sued for $59; the defendant controverted the whole claim; a trial resulted in a judgment for the plaintiff for $25; the defendant appealed. The court said: "What then is in controversy, so far as appellant is concerned? It is true he was sued for a larger sum than $50, but he succeeded in defeating a recovery beyond the $25. Is there any amount now in controversy that can in anywise affect him except that which was recovered against him in the court below?" Finding that the appeal only involved a controversy over the $25, it was dismissed for want of jurisdiction (Tipton v. Chambers, 1 Met., 567). Therefore, when the defendant appeals the value in controversy is fixed by the amount of the judgment against him, which he is seeking by the appeal to avoid.

But by what principle is it fixed when the plaintiff appeals? Where, on a money demand, the difference between the amount decreed to appellant in the court below and the amount of the claim asserted by him in that court is not sufficient to give the appellate court jurisdiction, the appeal will be dismissed. (Batchelor v. Richardson, 75 Va. (Mathews), 835.)

So in Vance v. Cox, 2 Dana, 152, the appellant had sued for $10,000 damages, and judgment was rendered for defendant. The court said: "There is no judgment against Cox for which an execution could be issued for more than the costs; but as

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he sued for $10,000, the judgment in bar of his action may be deemed in effect a judgment against him to the full extent of his claim for damages. * * * So far as he may be apprised the amount claimed by him, or the amount in controversy, should be deemed to be the 'amount' of the judgment against him, or to his prejudice. The 'amount in controversy,' 'the matter in controversy,' and the 'amount' of a judgment against a plaintiff should, we are inclined to think, be understood as meaning, in substance and effect, the same thing." Language equally as pointed was used in Williams v. Wilson, 5 Dana, 597, and the same doctrine was announced in Brandies v. Stewart, 1 Met., 396.

It is established by these and other authorities that the same principle which determines the jurisdiction when the defendant appeals also determines it when the plaintiff appeals, and that in both cases it is regulated by the amount of the judgment against the appellant. There need, therefore, be no difficulty in ascertaining the value in controversy, no matter by which party the appeal is prosecuted, in an action upon a money demand; if the defendant appeals, it is the amount ordered to be recovered from him; if the plaintiff appeals, it is the amount he sued for and failed to recover. If the plaintiff recovers nothing, then the judgment is against him for his whole demand; if he recovers only a part, then the judgment is against him for the part upon which he failed; and, as said in Batchelor v. Richardson, supra, the difference between what he sued for and what he recovers determines the jurisdiction of the appellate court. No other rule should be adopted, for it would be gross injustice to limit the defendant's right of appeal to the amount of the judgment against him, without applying the same test to the plaintiff.

But to ascertain whether a judgment is against a party and to what extent the object of his pleadings must be examined. If he has obtained the relief he sought the judgment is for, not against him, and this court would have no jurisdiction upon his appeal; if he has obtained only a portion of the relief sought, and the part for which the judgment is against him is not sufficient to authorize an appeal, we would still have no jurisdiction. For instance, if a plaintiff sues for $500, and ob-

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tains judgment for his entire demand and costs, we would have no jurisdiction of an appeal prosecuted by him for, the defendant being satisfied with the judgment, the value in controversy would be nothing. So if the judgment had been for the defendant and he appealed. If the judgment had been for $450 this court would not have had jurisdiction of an appeal by the plaintiff, as the value in controversy would have been measured by the judgment against him, which was only $50. If the judgment had been against the defendant for only $50 we would, for the same reason, have had no jurisdiction on his appeal.

Nor are these principles affected by the form of the relief sought—to the extent that the judgment grants the relief asked it is a judgment in favor of the party pleading therefor.

With these principles in mind let us examine the case at bar. The original action was instituted by A. J. Ballard, and appellant and appellees were made defendants. Davis & Kellar filed an answer which was made a cross petition against Loagn, and Logan filed an answer which was made a cross petition against Davis & Kellar. Daivs & Kellar prayed that their deed from the sheriff be sustained, but if that could not be done, then that they be allowed the amount they had paid at the execution sale, and ten per cent. thereon, as provided by statute in cases of sales under execution of encumbered property. Logan alleged that the property had been levied on as encumbered property, and prayed that the deed be annulled, and that Davis & Kellar be treated simply as execution purchasers of encumbered property to the extent of their bid, stating the amount thereof to be $161.13. The object which Logan sought by his pleadings was to cancel the deed and compel Davis & Kellar to take in lieu thereof the sum of $161.13, with 10 per cent. interest thereon, and that is exactly the relief which the court granted. As we interpret the appellant's pleadings there has been no judgment against him—the court has given him the relief prayed.

But by his assignment of errors and argument of counsel on this appeal he insists that he did not get all the relief his pleadings entitled him to—that in estimating the amount of the execution debt the court fixed it at $61.81 too much. Even

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if this were true, still the judgment would only be against him to that extent, and the value in controversy would not be sufficient to give jurisdiction.

The petition for a rehearing is, therefore, overruled.

I. R. Green for appellant.

Emmet Field for appellee.

"HOW TO ARGUE A BAD CASE."

The following response to the above toast by Mr. Geo. M. Davie, of Louisville, was delivered at the recent meeting of the State Bar Association in that city:

Mr. Chairman—Peculiar as the theme may appear with which your Committee on Toast have burdened me to-night, still there is no legal problem which so often besets the unhappy attorney, or upon which he spends more anxious and vain cogitation. When this problem is successfully solved a great step will have been taken towards that "Golden Age" of the lawyer's dream—when both sides will win every case. With a view of investigating into the nature of "bad cases" (a branch of the law hitherto unfamiliar to me), I have consulted some friends at the bar, who are known to have established rather a specialty in that line, and you shall have the fruits of their learning and experience.

Let us assume, my brother, that an unfortunate client has called upon you with his case. You have examined it, and, not seeing any ground to fight upon, you have gone to the other side with overtures of peace, making the usual announcements to the effect that "there is nothing that you hate so much as litigation," that you "think the matter ought to be settled;" that you "only want the fair thing all around;" and that you are "willing to make sacrifices" to attain that just end. Let us assume that the other side has rejected the offer in such emphatic, not to say sarcastic, terms as to put all further treaty out of the question. Let us assume that you have become thoroughly convinced of the justice of your client's cause—by reason of a cash retainer or a contingent of such magnitude that it makes the pleasures of a great hope equivalent to those of a smaller realization. For bear well in mind

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that the first step in the preparation of a bad case is, as far as practicable, to reduce to manual possession that which one of the old sages of the law has termed "id certum quiddam honorarium, of which ye learned make most reverent mention, but which ye vulgar coarsely denominate an 'fee.' "

I am not to dwell here upon that species of bad cases which must come before the intelligent and august jury. The arts and expedients of the advocate in seeking that justice before a susceptible jury which the cold-hearted law would deny him before the judge, are too familiar, and the recent commentaries by the Cincinnati rioters have brought so prominently before the public the eccentricities of legal genius in bad jury cases that the profession does not need to be enlightened on that subject just now. The bringing of the widow dressed in black into the court room; the pinching of the interesting children at the proper time to produce plaintive emotion; the calling of jurors by their names with affectionate familiarity, and the "taffying" them singly and collectively in language that causes them to blush with conscious emotion at the hitherto secret truth, are well known to you all.

Your committee has instructed me that they desire from me only a few didactic remarks upon the argument of such cases before the judge.

In arguing a bad case before the judge the first thing for the sagacious practioner to do is to get as far away from the merits of the case as possible. With this idea you must make your real case of secondary importance, or further off even than that, if possible. Plant yourself at once, therefore, upon some broad principle, and endeavor to allure the other side into grappling with you upon it. Rise above the mere case of your Mr. Jones, and make the country at large stand as your imperiled client. In other words, the first thing to do, if possible, is, with a look of profundity, and voice of rotundity, to raise a "constitutional point."

Now there is nothing so pleasing to the ordinary nisi prius judge as to have raised in his court deep problems of constitutional law. When you rise, with a copy of Cooley, Story and other constitutional authorities spread before you, and, for pur-

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poses of greater impression, the fifty pound volume of the United States Revised Statutes containing the Federal Constitution (for the bigger the book the better in constitutional arguments), you will perceive the judge at once undergo a marked change. If he has from democratic tendencies, or from the heat of summer, taken off his coat, or drawn his boots, you will see him carefully put them on, and, bracing himself back as an "upright judge," sit with a thoughtful air, conscious that there now hangs upon him the destiny of the country and of the future unborn. You may perhaps perceive during the argument none of the usual signs of weariness, but rather that expression of fortitude and depth which one might imagine Chief Justice Marshall's countenance to have exhibited during the argument of the Dartmouth College case by Daniel Webster.

There is nothing better in a bad case than to announce, with emotional intensity, that the effort of the opposing counsel would, if permitted to be successful, result in a decomposition of "vested rights," or that they would ruthlessly impair the "solemn obligation of contracts;" or that they are permeated with "ex post facto" malignity.

Magistrates' courts, I have observed, are peculiarly susceptible to the seductive influence of constitutional law.

Nor, in these fundamental ramifications, should you confine yourself alone to the Constitution of your particular State. You should "broaden yourself out" and take in the Constitution of the Union, including the recent amendments, which, under a "broad-minded" construction, you may contend, with a fair hope of being allowed to proceed, to mean almost anything that your necessities require. Nay, your genius, if capable of still greater daring, may soar back to "Magna Charta" itself, and disport awhile amid reminiscences of "Runnymede," "King John," and the "Powerful Barons," who so often serve for padding in the powerful efforts of our locally great.

When, however, you feel that you can no longer sustain your flight in the rarefied atmosphere of the lofty altitudes of constitutional law, be sure, in your downward descent, that you alight upon the "statutes."

Now, in the great body of statutory law, it will be marvelous indeed if you can not find something that will give you hope

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and comfort. Remember, in the first place, that all the statutes of England prior to the "fourth year of James I," are as good as new here in Kentucky. Remember, too, that all the statutes of Virginia "prior to 1792" are also legal tender. Remember further, that all the statutes that fill the tremendous volumes of the "United States Statutes at Large," are full of potency and that the great body of our own laws, as amended and improved by the constantly augmenting wisdom of succeeding legislative intelligences, has created a mass of profound statutory law, some of which will strengthen almost any bad case that may be imagined. There are many sections of our Code that can, by a little ingenious construction, be converted into bulwarks behind which a bad case may rest in apparent safety. I remember, a few days ago, when an injunction was sued out to prevent a Kentucky corporation (the Knights of Honor) from emigrating from the State of Kentucky to Missouri, an ingenious friend suggested to me, as counsel for the proposed emigrant, a statutory argument, my failure to use which possibly led to the perpetuation of the injunction. He called attention to section 688 of the Code, which "abolishes the writ of ne exeat," and he said: "How can this corporation be prevented from going out of the State when the writ of 'ne exeat' has been abolished by solemn statute?"

If, however, you can not, by ingenious and subtle transfiguration of the statutes, manage to anchor your case in the rapids, the next best thing is to fall back upon your reserve learning, and to make disclosure of what my Lord Coke calls "The Amiable and Admirable Secrets of the Common Law."

The current scientific theory of this day is that of "evolution," and one of the leading tenets of evolution is that mankind, in its progress from barbarism to civilization, passes through many degrees of morals; so that at one time in its career a thing will be considered right, which at a later time will be declared wrong, very much as the clothes of a child are ridiculed as unfit when he comes to be a man.

Whatever case you may have, therefore, and however bad it may seem now, it is pretty certain that it would have fitted the ideas of right in some one stage of the progress of the evolution of England from its barbaric state to its present con-

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dition. The fact is, that a bad case is somewhat like Lord Palmerston's famous definition of "dirt." He said that dirt was simply "matter out of place." So a bad case is simply a case out of time. In old times we know that murder was rather approved as a fine art in England; and we know that batteries and trespasses were by no means as reprehensible as now. Embezzlements are still cherished by the common law as no crimes. You have, therefore, only to search back through the various strata of the English common law to that one to which your case properly belongs, and you will generally have little difficulty in finding precedents somewhere in the line that fit and justify it entirely. For example, the case, bad at this time, was probably a good case in the time of Coke; and, therefore, Coke is your authority. If your case be very bad, you may have to go as far back as Bracton, or even to the Year Books. But then the further back you go the more learned it sounds.

And it is to be said in favor of this common law mode of presenting a bad case that nothing is more pleasing to the judge then to hear arguments, and to rest his opinions upon old common law points. An opinion of a modern judge, so full of the old common law authorities that you can almost blow the dust off it, is looked upon by its author with peculiar pride; for he knows that it is sure to be complimented as "able and exhaustive" by succeeding lawyers who may have occasion to cite it as authority in their favor.

Let us assume, however, that you have searched the heights of the Constitution and the depths of the statutes and the varying strata of the common law, and found no comfort there. Under such circumstances it may pay you, like many persons who have committed dubious acts in England, to take a little trip abroad. In other words, you should stray over into the domain of the "civil law." You may thereupon descant learnedly upon the "Code of Justinian" or the "Code Napoleon," and exhibit traces of a mind too broad for this hemisphere. You will find that a little dab of civil law, especially in Latin, will sometimes cause the judge to come down without further debate.

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A large amount of this peculiar Latin may be found ready in Judge Story's Book on Bailments.

If, however, all of these successive resources that I have named prove fruitless, you will be driven to another resort, viz., the Kentucky Reports. And here let me warn you not to be downcast or disheartened at this stage; nor should you yield to the gloomy apprehension, that because you have found the law against you everywhere else you will also find it against you there. By beating the "Bushes" you may expect to scare up much unexpected law.

Of course, if a case is found in your favor there, it generally ends your troubles; for it will be followed by all the courts in the State, except sometimes by the one that rendered it.

There is also a very valuable magazine of unknown learning in those manuscript opinions marked "not to be reported." I have known some desperate cases to be won by the citation from memory by our older lawyers of manuscript opinions, which, however, they always assure us younger members were "burned up in the appellate clerk's office fire in 1865."

An ingenious member of the bar, it is said, has with great advantage invented the idea of saying to the judge below that he has, besides reading the opinion, had a more or less confidential talk with the judge who wrote it, in which the judge told him that the opinion was meant to go much further than on its face it seems to go, and our friend sometimes accompanies this with an intimation that if the judge below does not regard the additional light thrown upon the opinion by this confidential communication the chances are he will have occasion to meet that most dreadful of all things to a nisi prius judge, a reversal of his opinion on an intimated appeal.

If you find, after a careful exploration of Barbour's Digest that the Kentucky law also is silent when you invoke it, the next thing left you is to attack that myriad-minded monster, the "United States Digest." Sit yourself down, therefore, to this work of digestion, in that hopeful spirit in which the sick and hungry Sancho Panza contemplated an "Olla-podrida."

"Quote Sancho, that great dish which I see smoking yonder I take to be an olla-podrida, and amidst the diversity of things

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therein contained, I may surely light upon something both wholesome and toothsome."

It is the boast of our American people that, owing to our very great diversity of soil and climate, we are able to show well-nigh every product of nature, from the tropical fruits of Florida, Texas and the Pacific Coast, to the hardy pines of frigid Maine. But while America may be proud of her diversity of products in other directions, her greatest praise for variety of production is certainly in the line of the law. If a vote were put on any conceivable point to the reports of the thirty-eight States, rarely indeed would it be "unanimously carried." It has been poetically said that when Nero died "one" hand strewed flowers upon his tomb; and no matter how bad your case may be you may rest assured that you can lay upon its tomb the tribute of some precedent in its favor from the United States Digest.

Let us suppose, however, that you have gone through all these processes of enlightenment, and have bombarded the court with the various legal artilleries I have named. Let us suppose your case so bad that you can develop nothing in the Constitution or the statutes or the decisions to support you. Still do not succumb. Your case is a hard one. But all is not yet lost. There is one last resort for the despairing attorney. There is one faint light which his dying eyes may see. It may not amount to much. It may prove illusive. But it is the duty of the lawyer to try all legal means. As a last resort, therefore, my friends, and only in that dreadful extremity, fall back upon what is known as the "argument upon principle" and the "merits of the case."

In that emergency you may proceed to give, possibly from your own personal knowledge, a vivid biographical sketch of the moral perfections of your client, and perhaps likewise a converse picture of the mental and moral obliquities of his opponent. Pay that compliment to the credibility of your witnesses which they have always deserved, but have perhaps never before received. Denounce the "technicalities" of the opposing law. Appeal to that higher plane of the profession, in which the judge, overlooking mere technical precedents rises into abstract ethics, and considers the case upon "high points and general principles." Indulge the sensibilities of the

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race. Bring the calm light of the emotions into play, to assist the logic of the court. Paint the beneficent effects of the decision in your favor. Depict the fearful consequences of a decision against you. And wind up with an inspiring burst of professional fervor or by a pathetic appeal in a minor key.

If, however, in spite of all these laudable legal efforts the judge below is obdurate, and the decision is against your unhappy client, still, my brother, do not yield wholly to despair.

As in the death of a good man comes his brightest hope, so in the loss of a bad case comes its best opportunity. Remember there is organized in the jurisprudence of every State a series of superior tribunals, "created for the express purpose," as Judge Emmons once said, "of reversing the lower courts." Remember, as you lie rolling over in the dust of the lower arena, that there still stands a higher tribunal, whose doors are only open to the defeated and the beaten, and to cases adjudged "bad," and to which the successful can never appeal.

At the threshold of the appellate courts the history of a "bad case" naturally ends; for there, under the requirement of even-handed justice, all cases must stand alike.

NEW BOOKS.

Myers' Federal Decisions, being the opinions of U. S. Supreme, Circuit and District Courts, from their organization to the present date, with extracts from Court of Claims and opinions of the attorneys general. Vol. IV, Bonds to By-Laws. Gilbert Book Co., St. Louis, Mo., pp. 1007.

As we have already said in a previous number, this series of reports can not fail to be of great service to the profession, being, as it is, a reprint of the U. S. Circuit and District Court Reports, many of which are very difficult to obtain, and a complete set of which costs $1,500. We were inclined at first to dislike the arrangement of the cases adopted in these volumes, which is according to their subject-matter instead of chronologically. This volume (IV) contains all the cases decided by these courts since their organization on the subject of Bonds. After closer examination we like this system better.

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It is obviously of great advantage for ready reference. Some other objections which we had have been removed. The accuracy of the editorial work in this volume is vouched for by Mr. Jno. W. Daniel, the author of a work on a kindred subject, Negotiable Instruments.

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The Kentucky Law Reporter

EDITORS:
HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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CURRENT TOPICS.

The Albany Law Journal has unearthed a very curious old murder case (from the Harleian Collection, volume III), in which three innocent persons were hung for the murder of a man who had never been murdered, and that, too, upon the confession of one of them that they had committed the murder.

A man named Harrison went one afternoon from his home to a neighboring village to collect some rents, and not returning at a late hour the wife sent his servant, Perry, after him, but neither of them came back that night, so early the next morning young Harrison started to the village, and on the way met Perry returning, who said he had sought, but had not been able to find, his master. They looked further, and during the day found his hat, knife and some other articles covered with blood, but no further traces of him. From Perry's suspicious account of his movements during the night he was arrested, but at first stoutly denied the crime; at last, however, he made a detailed confession, and implicated his mother and brother along with himself. The three were placed on trial, when Perry denied his confession, claiming that he was mad when he made it, but it was given in evidence and the three were convicted and hung. One day, about two years afterwards, the man sup-

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posed to be murdered startled everybody by suddenly turning up. No motive for Perry's strange confession is known. The judge at first refused to try the indictment because the corpus delicti had not been produced, but this objection was afterwards overcome in some way.

The United States Supreme Court has recently decided that where a creditor receives collaterals as security for a debt due him, and he appropriates them to his own use, he is not guilty of breach of trust, but breach of contract only, from which he is discharged by a discharge in bankruptcy. (Hemrequin v. Cleeves.)

It will be remembered that in the Hawes case, 13 Bush, 697, it was held that a criminal extradited and brought back from Canada or other foreign country to this country for trial can not be tried for any other than the particular offense for which he was extradited; if he is acquitted of that he goes free. But it has been recently held by Supreme Court Wisconsin, in State v. Stewart, that this does not apply to inter-State extradition, and where one was arrested in Indiana upon a requisition from Wisconsin for embezzlement, he might, upon acquittal of that offense, be again arrested and tried for the distinct offense of obtaining money under false pretenses.

The Alabama Supreme Court has recently held that when a person who has been convicted of a criminal offense takes an appeal to an appellate court and, pending such appeal, breaks jail and withdraws himself from the jurisdiction of the court, the appeal will be dismissed on motion and not heard unless such fugitive again submits himself to the jurisdiction of the court by returning to the custody of the proper officer of the law.

An English lawyer's right to his fee seems to rest on a very intangible basis. An interesting case is mentioned in which a

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barrister gave up all his regular practice to devote himself to a particular case, and after years of devoted labor succeeded in winning it. His client, being a woman, utterly ignored him as soon as she had the estate in enjoyment. He thereupon brought suit (Kennedy v. Brown, 32 L. J. R. C. P., 137) for his fee, amounting to $100,000. But the judges would not allow him any standing in court. They enlarged on the value of an advocate's services to his client, but held that his remuneration must be a gratuity—an honorarium, for which no suit could in any case be brought. The plaintiff was utterly ruined, having abandoned all his other practice for the particular case, and died shortly afterwards broken hearted.

Judge Dillon, in his recent address before the National Bar Association at Saratoga, declares himself in favor of a conservative scheme of codification comprehending the principles of the law relating to the ordinary and daily affairs of life and of society, stating what is clear, removing what is obsolete, settling what is doubtful. He expressed the opinion that codification within the limits named would sooner or later be adopted in England and then, if not before, in this country.

Continuing, he objected strenuously to the practice adopted in appellate courts of submitting cases upon printed briefs and disfavoring oral argument at the bar. He declared that, as a means of eliciting truth and reaching sound judgment, there was no substitute for oral argumentation, and he considered the substitution of printer's ink, for face to face argument had been attended with the most injurious results. He objected also to the practice of assigning the record to one judge to write the opinion without previous examination of the case in conference by all the judges. In both of these respects it gave him pleasure to say he considered the Supreme Court of the United States to be a model for all other appellate courts in the country.

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COURT OF APPEALS OF KENTUCKY.

McMAKIN v. SHELTON.

(Filed September 11, 1884.)

1. Guardian ad litem—Appointment of—The court may, in its discretion, appoint a guardian ad litem, though the infant have a statutory guardian. The affidavit that there is no statutory guardian is not a prerequisite to the right to appoint, but is merely a reliable mode specified by the Code for informing the court.

2. Upon the trial by a jury of an issue of fact in an equitable action the testimony may be given orally.

3. Fraud—Relief—Nulla Bona—Where one is seeking to recover money fraudulently obtained from him he may, in the same suit, ask that property previously conveyed by defendant, without consideration or fraudulently, be subjected to the judgment, although he has no return of nulla bona.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

It is needless to discuss the right of recovery on the facts alleged in the petition as the case has been heretofore in this court and the petition adjudged to be good on general demurrer, and we perceive no reason why the collection of a part of the debt on the notes that were forgeries as to the surety, but binding on the principal, should release the surety on the note conceded to have been binding on all until the surrender to the principal obligor, and the forged notes accepted in lieu thereof.

It was for the benefit of the surety to collect the money on the forged notes, and the amount of that collection has been credited on the note in controversy, and no well founded complaint arises from this alleged error.

Another ground for reversal in this case is that the infant defendants appeared and defended by their guardian ad litem, when the record shows they had a statutory guardian, whose duty it was to make defense for the infants.

Section 38 of the Civil Code does provide that "no appointment of a guardian ad litem shall be made until the defendant is summoned, etc. Nor until an affidavit of the plaintiff or his attorney shall be filed, and showing that the defendant has no guardian, curator, nor committee residing in the State known to the affiant." Subsection 2 of the same section pro-

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vides that a guardian ad litem may be appointed by the court or the judge thereof, whether a guardian, curator or committee appear for the defendant or not, or by the clerk of the court during vacation, if the affidavit mentioned in subsection 1 of this section be filed. No affidavit could have been made in this case that there was no statutory guardian, because the record showed there was such a guardian, and if it had been suggested to the court that the guardian, was present, or an affidavit filed that no guardian ad litem was necessary for that reason, the court under subsection 2 was authorized to appoint a guardian ad litem. The appointment is left to the discretion of the court, whose duty it is to see that the interest of the infant is protected and a proper defense made for him.

The prime object in requiring an affidavit as provided in subsection 1 of section 38 is to notify the court of the existence of a statutory guardian, if one has been appointed, whose duty it is to defend for the infant, for the reason that such a guardian is presumed to know more of the question involved in the litigation than a mere stranger, and, therefore, is in a condition to make a substantial defense if any exists; but, although the guardian is in court, the judge may still appoint a guardian ad litem as provided in subsection 2. The statutory guardian was in court; had been served with process for the infants, but made no defense for the reason doubtless that their mother and the administrator of the estate of their father had made the issue as to the right of recovery on the old note, and the counsel representing the estate was made guardian ad litem that the infants might make a common defense with their mother. A statutory guardian may, by neglecting his duty, decline to defend, or the judge, under the circumstances of the particular case, may deem it proper that the infant should be defended by a guardian ad litem instead of the statutory guardian, and in all such instances the discretion of the court will be controlled in its action by what is conceded to be the interest of the infant defendant. Here the infants have been properly served with process; the guardian notified and the defense filed by the mother, and the administrator made the defense

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for the infants, and it would under the circumstances be trifling with justice to say that the absence of an affidavit, that there was no guardian when there was one, precluded the court from appointing a guardian ad litem, and necessitates a reversal of the judgment below. The issue in the case was as to the liability of the intestate on the old note surrendered for the forged notes. The question was submitted to the jury on that issue as directed by the chancellor, and when tried the judgment was for the appellee. Oral testimony was heard on that trial, and the objection that it should have gone to the jury in the form of a deposition is unavailing. The ancient chancery practice permitted the introduction of this character of testimony, at least such has been the practice in this State. (Savings Bank v. Newton, 2 Metcalfe, 243, and Reading's Administrator v. Ford, 1 Bibb, 338, and besides subsection 2 of section 552, when treating of issues of fact in equitable actions, provides that the court may require oral testimony upon a trial by jury.)

Another question raised by counsel is that the chancellor had no power to subject the land conveyed by the intestate to his wife and children upon the ground of fraud or no consideration until he had obtained his return of no property found. It is certain that the appellee, when seeking the aid of the chancellor to relieve him from the fraud and forgeries by which he was induced to surrender a valid claim, had gone to the proper tribunal for relief, and, the claim being of equitable cognizance, he had the right to combine with his prayer for judgment the further prayer for subjecting the property fraudulently conveyed to the payment of his debt. There may have been some question as to the propriety of making the widow and infant children defendants or of inverting the causes of action, but having done so, and no demurrer being interposed upon that ground, it is now too late to raise that question.

In Halbert v. Grant, 4 Monroe, 580, this court has said: "Where the claim is purely equitable, and such as the chancellor will take cognizance of in the first instance, he will at the

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same time go the entire extent and inquire into obstructions in the way of enforcing the demand." This is the third time this case has been passed on in this court, and at this stage of the proceeding it is not necessary to inquire into the sufficiency of the pleadings or the nature of the remedy adopted. All those questions have been passed on at a former hearing, and besides the appellee was entitled to the relief.

Judgment affirmed.

E. E. McKay for appellant.

John S. Kelly for appellee.

HARRIS, &c. v. BERRY.

(Filed May 29, 1884.)

1. A guardian must act in good faith and with the same discretion that a prudent man would show in the management of his own affairs. In collecting a claim from a debtor resident in another State he is not required to do more than employ a competent attorney or agent in such State to look after the debt.

2. The adult age in Missouri being 18, a guardian, whose ward resides here, can not sue there in her name as for an infant because she is not of age here until 21.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1864 Robert Philips died in Perry county, Missouri, the owner of a large estate, real and personal. He left a last will and testament by which he devised his estate to his widow and children. He had been twice married, leaving surviving him four children by his first and one child by his last wife.

Henry L. Caldwell, of Missouri, and the appellee, N. T. Berry, of Lebanon, Ky., were appointed as his executors, Caldwell alone qualifying. In his will he gives to his children certain portions of his real estate, and to some more valuable than that given to others, and requires his executors, as soon as practicable, to have the property devised to his children valued, and in the distribution of his personalty due regard is

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to be had to said valuation so as to make all the shares of his children equal. He appointed the appellee, N. T. Berry, the testamentary guardian of his children by his first wife, and requested that each of them and their estates should be transferred to Kentucky as soon as practicable.

It was also his will that the county court should make division according to his will without waiting for three years to expire, as required by the statute of Missouri. In 1865 the appellee, N. T. Berry, qualified as guardian for the four children in the Marion County Court in this State, and the children were removed by him to Kentucky, and their domicil was in this State from that time until the appellants, the daughters, married. One of them, Laura, married S. L. Gray and the other, Lemette, married J. M. Harris.

The grandfather of these children died in the year 1866, and Berry, the appellee as their guardian, made a settlement before the Marion county judge in 1869 of the estate coming to his hands from their grandfather.

In 1869 and 1871 the appellee made settlements in the same court of what came to his hands from both estates. In 1872 he made a final settlement of his accounts as guardian of Lemette, who married Harris, she being 21 years of age, and in 1874, after Laura became of age, made a settlement of her accounts.

This action is brought by the two daughters and their husbands, seeking to make the guardian liable for amounts that came into the hands of the Missouri executor and were unaccounted for by him, it being alleged in the petition that the same was lost to the appellants by the reason of the want of diligence on the part of their guardian in collecting it in the attempt to collect their estate for distribution. Each distributee of this estate was entitled to about $11,000, and failed to get that much by some $3,000.

It is alleged in the petition that the judgment obtained against Caldwell in the Marion County Court on his final settlement, that was not made until 1870, was $9,072 to each one

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of the children, and the amount of this judgment the appellants say was concealed from them by the guardian, and for this they ask a judgment. It is evident that this sum was the entire amount due to each child from the personal estate, and that the greater portion of that judgment had been paid to the guardian and by him accounted for in his settlement with his wards. The judgment seems to have been rendered or the final settlement made without reference to what had been paid by the executor, Caldwell, to the guardian. Berry had in fact received for his four wards near $17,000 before the settlement of 1870 was made, and after that time collected other sums, all of which he has settled or accounted for in his settlements. The only question is, should he be compelled to account for the assets that never reached his hands? If he used such diligence as a prudent business man would have exercised under the circumstances he should not be held liable.

He undertook to collect the estate of the infants in Missouri, and having done so he was required to use such diligence at least as he would have used in reference to his own affairs. It was not required of him that he should remain in Missouri and watch this estate as a resident guardian or fiduciary should have done, but he was required to have some vigilant, prudent agent or attorney to aid him in the collection of the moneys due his wards, and to take such steps as seemed to be necessary for that purpose.

We think the general rule as to the diligence required of trustees and guardians, when applied to the facts of this case, releases the guardian from any liability for the default of the executor. The rule is "that nothing more should be required of a trustee than that he should act in good faith and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs." To subject a guardian to losses that he could not anticipate, and when the evidence shows that he is acting in good faith and with at least ordinary judgment would be inequitable and unjust.

The case of Hemphill v. Lewis, 7 Bush, 214, is relied on by

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counsel for the appellants in this case, where one guardian sued a former guardian, but omitted to sue his surety, and the guardian becoming insolvent and the claim not being prosecuted in time against the surety, the estate of the infant was lost, the guardian was held responsible. There is a seeming hardship in that case in making the guardian liable, as this court has in many cases recognized the general rule already given that "a trustee who, in the faithful discharge of his duties has, in a matter of judgment or discretion, erred so as to injuriously affect the parties in interest, he will not in general be held liable unless guilty of gross neglect" (Cann v. Peter, 6 Bush, 628). In that case, however, it might well be said that the failure to sue the surety, and thereby permitting him to be released by lapse of time, was a gross neglect of duty, and for that reason the guardian should be held liable.

The executor had three years in this instance in which to make distribution by the law of the State where he qualified. He made a final settlement in 1870, and during a great part of the time he acted as executor, having qualified in 1864, the country was in such confusion and the business interests of the State of Missouri so much crippled as to render it difficult to settle, collect and distribute a large estate with the facilities that would be required of a fiduciary under ordinary circumstances. The appellee, Berry, had sought the advice and employed as his agent the best counsel that part of the State afforded, and when the settlement was made in 1870, upon which an execution might have been issued for the amount due in accordance with the law of that State, the appellee was advised by his counsel that he had better not issue the execution; that more could be made by delay than by attempting to coerce payment. Acting upon professional advice and being placed in such a condition as absolutely required of the guardian that he should seek such advice, it would be unjust to hold him responsible, when living in Kentucky he could not be presumed to know as much of the business affairs of the executor and his ability to pay as those who lived in that State and were familiar with his surroundings.

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Besides, in 1870 one of the wards, by the law of Missouri, was sui juris, and the other became so in a short time thereafter. The executions had to issue in the name of one of the children at least, and was so issued, she having the same right to control it as she would have had if of full age under the law of this State. The status of all persons who seek the aid of the courts of law or equity in Missouri must conform to the law of that State, and if the female, at the age of eighteen, is empowered by law to sue and be sued, the fact that she is not of age by the law of the State where she lives will not authorize her guardian to sue for her or permit the mode of procedure in Kentucky to control the manner of relief in Missouri.

The law of Missouri gave to the children a lien on all the real estate of the executor to secure them in the amount of their judgment, and by the advice of counsel the issuing of the execution was delayed, as it was manifest, in the opinion of counsel, that if executions issued the property would not pay the judgment. He gave no authority to his attorney to hold up the executions longer than he thought prudent, as Berry states, and to use such judgment on his part as would enable him the more certainly to make the money. His actions and conduct should not be judged, and the same responsibility attached to his acts as would be the case if he had lived in the county and State, and, as a business prudent man, would have been required to exercise his own judgment in regard to a matter about which he was as capable of judging as the attorney employed by him. The testator knew when he selected the appellee as the guardian for his children that the latter must necessarily select some one to act for him in Missouri in winding up this estate. If then he selected a prudent adviser and counselor, he ought not to be made liable even if his agent acted improperly in not issuing his execution sooner, the execution having been issued in 1872. The fact also appears that the attorney did collect, without the aid of an execution, $2,000 after the settlement was made. Ceisel, his lawyer, died and

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the guardian then employed other able counsel to defend an action in equity with an injunction that the executor had obtained against the collection of the execution issued from the county court. That injunction was dissolved, the executor obtaining a credit for a small sum that by mistake had been charged against him.

The judge of the circuit court testifies that "during all of his professional experience he never saw a man more diligent and attentive to the interests entrusted to his care than Mr. Berry during the entire litigation, or who under like circumstances used greater efforts to protect those interests than he did then and afterwards." This statement is corroborated by all familiar with the business connected with the settlement of this estate and the acts of appellee with reference to it.

After Berry, appellee, had settled with these appellants he informed them of the condition of the estate in Missouri. They knew of the equity action, the liability of the surety in the injunction bond, as well as the sureties in the bond as executor. He had employed counsel to prosecute the claim against the sureties, and these appellants were unwilling to look to the sureties and sought relief against their guardian, whose acts, so far as we are able to judge from this record, evidence not only the best of faith, but that degree of prudence that he would doubtless have exercised in reference to his own business interest, and, measuring his conduct by the standard of common prudence and judgment, no responsibility should rest upon him in the form of a judgment in favor of these appellants.

The county court of Missouri alone had the power to make the division between the children as required by the will of the testator. The division was made and the valuation fixed upon the real estate so as to produce equality between them, or, if not, the guardian should not be held responsible, besides giving to the appellants the interest they did get on the moneys paid them by the guardian to make them equal with those having real estate of more value, and giving to those having this real estate its income, and those receiving the money when settlement was made have now more income, by way of interest,

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than the income realized from the realty by those whose share in the personalty was lessened by having received it. So there is no such unjust division as calls for relief, and the guardian has received no more compensation than he was entitled to receive.

The judgment below is, therefore, affirmed.

W. B. Harrison and Jno. McChord for appellants.

Sam B. Berry, A. Duvall and Rountree & Lisle for appellee.

L. & N. R. R. CO. v. HOWARD'S ADMINISTRATOR.

(Filed September 4, 1884.)

1. Negligence—Railroad—A, walking on the railroad track at 11 o'clock at night, at a place where it crosses a high embankment, was killed by a passing engine, Held—The railroad is not liable unless it appeared that the trainmen knew of his danger, and could have saved him by ordinary care. (2.) The degree of care required in running over road-crossings and through streets of a town contrasted with that required in running over less frequented parts of the road. (3.) Rules regulating the blowing of whistles and ringing of bells are adopted for the protection of passengers, trainmen and the public using the track at public crossings, and not for mere trespassers on other parts of the track.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

In July, 1881, a young man by the name of John Howard was run over and killed by the cars of the appellant at a point near the town of Chicago in the county of Marion. The appellee, Thomas Roberts, qualified as the administrator of his estate, and instituted the present action under the statute against the railroad copmany, alleging that the death of his intestate was caused by the negligence of its employes in running the train. There are two counts in the petition, the one for ordinary negligence and the other for willful neglect. At the close of the evidence for the plaintiff the appellant moved for a peremptory instruction that was refused, and upon the final hearing a verdict and judgment was rendered against the appellant for $5,000.

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This court has often held that when the evidence conduces in any degree to establish the right of recovery it is improper to instruct the jury to find for the defendant, and before a nonsuit is directed to be entered it must appear, admitting the testimony to be true and the inferences fairly deducible from it, the party seeking to recover has failed to make out his case.

With this rule of practice long established and often recognized by this court it is proper to determine in the first place the question arising on the motion for a nonsuit, as it may avoid the necessity for considering the other propositions presented in the briefs of counsel. (Jarman v. Howard, 3 Marshall, 384; McPherson v. Hickman, 1 Monroe, 170; Rowland v. Hanna, 2 B. Monroe, 129; Eaky v. Cady, 18 Monroe, 99; Bell v. Rowland, Hard., 301; Gallatin v. Bradford, 1 Bibb, 209; Shay v. Turnpike Co., 1 Bush, 109.)

It appears from the evidence on the part of the plaintiff that defendant's road, about one-fourth or one-half mile south of where the appellee's intestate was killed, is very crooked, passing through several cuts and around curves, and that this part of the road the cars passed over before reaching the intestate. The latter had been working as one of the section hands on defendant's road prior to his death, and whether he was at the time in the employment of the company does not distinctly appear, nor is it important to inquire in view of the facts before us.

The intestate was boarding with Pat Kearns, who was the section boss, and lived about one and a half miles north of Chicago and about one-half mile north of where intestate was killed. The intestate had been to a dance near Chicago, and in going to his boarding house at Kearns' had gone on to the railroad and was following its track to his destination, instead of the ordinary dirt road, and while on the company's road, about 11 or 12 o'clock at night, was run over and killed.

The killing was on a long fill near a curve, with a down grade in the direction the engine was going at the time of the accident, and away from any town or road crossing. The en-

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gine had become disabled in some way and was on its way to Louisville for repairs, and had no train attached to it. From the testimony of the appellee, and this could alone be considered on the motion, the engine was running with great rapidity, ringing no bell or blowing any whistle at Chicago or any of the curvings. No one was on the engine and tender but the engineer and fireman. It was a clear night, but no moon, and the employes seem not to have known until the next day that the intestate had been killed by the train. Howard knew or should be presumed to have known that trains were likely to pass at any time on the road, and that his trip to his boarding house would be attended with danger. He was heard singing and making a loud noise as he pursued his way, and seemed to be thoughtless as to the danger.

He certainly ought to have known that there was nothing to advise the engineer or those in charge of the engine to look out for persons traveling upon that part of defendant's road at that hour of the night. If in a town or at a road crossing, or approaching either, it would have been the duty of the engineer to give the proper signal of the train's approach, and, even with the signal given, the company might be held responsible for the reckless running of the train at the crossing, as was held by this court in the case of the Louisville & Cincinnati Railroad Co. v. Goetz Administrator. In that case the right to the use of the road at the crossing was mutual, the company having the right to run on it with its trains, and the intestate the right to cross the track, it being a part of the ordinary highway. In the character of case cited both parties must exercise such care as men of common prudence and intelligence would ordinarily use under such circumstances. In the case before us the company had the exclusive right to the use of the road at the place where the appellee's intestate lost his life, and we see no reason for making the company responsible unless it should appear that those in charge of the train, after discovering the condition and danger of the party injured, could, by the exercise of the proper care, have avoided the injury.

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The error committed by the court below is embodied in instruction No. 1 given at the instance of the paintiff, with reference to the rules of the company, and for that reason a nonsuit was ordered.

There is a rule of the company requiring "all special and irregular trains, whether running by telegraph orders or not, must be run with great care, and whistle sounded one-half mile from all abrupt curves and obscure highway crossings, and when approaching stations." This rule was read to the jury as evidence, against the objection of the appellant, and proof introduced conducing to show that no whistle was heard at the curve or at any other time until it reached some station far beyond the point where the accident happened. This rule of the company, together with other rules regulating the running of trains, is made part of the record, and while they have been adopted for the safety of the passengers and the proper running of the trains, and to notify those who have the right to the use of any part of the road of the train's approach, the rule in question with reference to blowing the whistle when approaching abrupt curves was intended to avoid obstructions, and not designed for the protection of those who are so reckless of their own lives as to undertake to convert a railroad track into a common passway. The court told the jury that it was the duty of those in charge of the train to blow the whistle at abrupt curves, and if no such signal was given when Howard was killed, and if it had been given he would not have been killed, they must find for the plaintiff.

This instruction should not have been given, but on the facts of the case, as presented by the plaintiff, a verdict for the defendant should have been entered. After the intestate had placed his life in peril it was the duty of those in charge of the train, when made aware of his danger, to use all reasonable means at their command to save his life, but the engineer nor the fireman were required to know or to anticipate the presence of any intelligent human being on that part of the road at 11 o'clock at night. The right of a railroad company to use its

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track is exclusive of the public, except where they have the right to cross it, or where its use in a reckless or improper way must necessarily endanger the lives of those whose proximity to the road requires the exercise of care and caution by those running railroad trains. In passing through cities, towns or places where persons congregate greater care and caution must be exercised than on that portion of the road where human beings have no right or license to travel. The speed in which the train is propelled in such a case can not be said to be willful nelgect on the part of the company as to one who voluntarily places himself on the track, and is injured by reason of his own carelessness.

To adjudge otherwise would be to convert the track of the railway into a public road for the use of all who choose to go upon it, nor is it negligence of a less degree for which a recovery can be had, for the act of the party complaining was the direct and proximate cause of the injury. It is evident from the facts before us that the intestate lost his life by placing himself in such a position as made the danger to himself imminent, and but for such reckless action on his part would have received no injury. There was the absence of all care on the part of the intestate in protecting himself against the danger, and while it was the duty of those in charge of the train to avoid running over him, and to exercise even more than ordinary care for that purpose when apprised of the danger to which he was exposed, in this case there is no proof or any fact from which an inference might be drawn that the company's employes knew that the plaintiff's intestate was on the track, nor was there any reason upon which they could have based the belief that the intestate or any one else was using the track of the road as a passway at or near the point where the injury was inflicted.

The plaintiff's own testimony shows gross neglect on the part of the intestate, and the absence of any neglect on the part of the employes of the company.

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Rules and regulations adopted by the company for the protection of its passengers and trains do not apply to trespassers on its road, whose own wrongful and negligent conduct places them in danger, and the only obligation or duty on the part of the company or its employes in such a case is, when made aware of the danger, to avoid inflicting any injury if, by the exercise of ordinary diligence, they can prevent it.

When the facts are conceded upon which the charge of negligence is based it then becomes a question of law as to whether a case of negligence has been established, and the plaintiff's own testimony failing to show any cause of action the court below should have instructed the jury to find for the defendant. The judgment below is, therefore, reversed and the cause remanded, with directions to award a new trial and for proceedings consistent with this opinion.

Rountree & Lisle and Wm. Lindsay for appellant.

Russell & Russell for appellee.

COCHRAN & FULTON v. ANDERSON COUNTY NATIONAL BANK, &c.

(Filed November 15, 1883.)

1. Partnership—A and B having purchased a lot of whisky on joint account, A pledged the warehouse receipts to secure his own debt, Held—The individual creditor, though innocent, took no title as against B and the partnership crditors. One partner has unlimited right to sell the partnership assets but not to pledge them. (2.) The rule is otherwise where the partnership is a dormant one.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Pryor.

It is unnecessary to notice the preliminary questions raised by counsel for the appellee on the last hearing, and in the consideration of this case it will be treated as if all the actions had been consolidated and heard with the action in which Shipman was adjudged to have made a fraudulent preference as between creditors, bringing the case within the act of 1856. It was a case in which the entire estate of Shipman passed to

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creditors for distribution. It was so considered by the court below, and the only question to be settled here arises as to the conflicting liens or priorities in rights in the distribution of the fund arising from the sale of Shipman's property.

The evidence conduces to show that Shipman was a private warehouseman, engaged largely in buying and selling whisky on his own account and for others.

The appellants, Cochran & Fulton, became the indorsers of Shipman for a considerable sum of money, and in order to secure them in their liability he pledged to them as collaterals certain warehouse receipts for many barrels of whisky, with the serial numbers inserted, and if this controversy was alone with the appellants and Shipman there could be no question as to the former's right to subject the whisky to the payment of the debt for which they were bound, and which they were compelled to pay. The rights of other parties intervened, and they claimed the whisky that had been pledged to Cochran & Fulton as theirs, and were adjudged to have priority in the distribution of the proceeds of the sale of the whisky by the judgment below.

The firm of Cochran & Fulton, as the proofs hows, had many transactions with Shipman in the purchase and sale of whisky, and Shipman at one time purchased for the firm 1,000 barrels of whisky in his (Shipman's) name, with the agreement that he (Shipman) was to have a part of the profits. This was some time prior to the bankruptcy of Shipman, and has no connection with this case, except to show the manner in which Shipman was conducting his business.

It is well established that he purchased and sold whisky for others as well as himself, and that he had no partner connected with him in his general business, but now and then became jointly interested with others in the purchase and sale of specific lots of whisky, the whisky being identified by serial numbers, as is usual in the trade.

Vandyke, Powell, Monroe Walker & Son and the Anderson County National Bank are appellees here, and the three first

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named claim to have purchased jointly with Shipman certain specified lots of whisky that were deposited in his warehouse, and placed in each case to the account of the particular joint adventure.

Shipman and Vandyke entered into a writing, evidencing their purchase of 100 barrels of whisky or their joint interest in the 100 barrels. This whisky was identified by numbers, and removed to the warehouse of Shipman, and then placed to the account of Vandyke & Shipman. Powell had purchased two or more specific lots jointly with Shipman, with the whisky identified in and out of the warehouse in the same manner as Vandyke's, and so with Monroe Walker & Son. These transactions did not constitute the bulk of the business conducted by Shipman, but were small lots of whisky purchased on joint account, and openly held and claimed by the parties when in the warehouse, and before it reached the warehouse, as the joint property of the parties making the purchase. Shipman disposed of most of this whisky held on joint account, not leaving enough to pay to the other joint owners their proportion of the whisky or its proceeds. They claim that in a court of equity their claim is superior to that of the appellants.

The whisky or the several lots was purchased for the purpose alone of being sold and the profits, if any, divided.

It is not insisted in argument that Shipman had the right to pledge the whisky belonging to others for his own debt because it happened to be in his warehouse, or that he could issue warehouse receipts, and pledge those receipts as security for his debts. He had the power to sell the whisky because it was purchased by the parties for that purpose, and a sale would have passed the title, but here he has pledged whisky in which these appellees had a joint interest to pay his own debt, and this can not be done. One partner in a general commercial partnership has no such right, and in a single adventure, or when the partnership is limited to two or more adventures, in particular lots of whisky or certain specified property the right of one joint owner to pledge for his own debt can not be main-

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tained unless authority to do so is shown to have been given by the other parties in interest. It is conceded or the proof shows that the pledge was to secure Shipman's own debt, and of property that had been purchased jointly with others. It can not be said that appellees trusted Shipman too far, for if so the doctrine would apply to all cases where property is placed in the hands of the commission merchants to sell either for a particular individual or on joint account, nor do we understand that such a position is urged by counsel. They have endeavored to maintain that these parties (appellees) were dormant partners, and for that reason the whisky passed by the pledge. The proof is clear that they were not partners in the general business of Shipman, for if they were, and the name of Shipman was alone used, the parties who are dormant partners can not assert a claim to the property as against the creditors of the ostensible partner. This is the general doctrine applicable to commercial partnerships, but where parties purchase one or more specific lots or parcels of property on joint account, or in the nature of a limited partnership, and this fact is not attempted to be concealed, or the creditor of the one partner not misled by the others, there is no reason for the application of such a rule. If they dealt generally in the sale and purchase of whisky jointly with Shipman, and permitted him as the ostensible partner to possess, use and claim it as his own it would present a different question. No such case appears from *this* record. Their purchase of the lot or specified lots of whisky was made on joint account, without fraud or concealment as to the manner of the purchase.

It was entered on the books of the warehouse as the joint property of the parties. The appellees concealed nothing. Either party had the right to sell, as it was purchased for that purpose, but neither had the right to pledge for his own debt. The appellants took the pledge from Shipman, believing that he was the owner, but these parties gave him no authority to pledge the whisky in that way. They had done nothing to deceive appellants or to mislead them in the transaction with Shipman.

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If they were dormant partners they would be liable for appellant's debt, but when appellants purchased whisky of Shipman or took whisky in pledge from Shipman, they must know that it is Shipman's property, or that he has the authority to sell or pledge.

Appellants ask: How were they to find out who was the owner of the property? The answer is: How are they to find out the owner of any of the lots of whisky in Shipman's warehouse? They purchase or take the pledge at their peril. The doctrine of caveat emptor applies in all such cases.

Such warehouses under the warehouse law of the State are filled by whisky belonging to many parties. They are places in which whisky is stored, not alone for the owner, but for others, and the owner of the warehouse has no power to issue warehouse receipts so as to pass the title against the consent of the owner. The question made in this case as to the effect of the warehouse receipts pledged as collaterals to the appellants may be simplified by asking the further question: Can one joint owner of property pledge the whole to secure his individual debt without the consent of the other, or in a case where they purchase two or three specific lots of whisky for the purpose alone of sale and profit, can one pledge the whole whisky to secure his own debt? To either question we think there must be a negative response, and the fact that the one having the possession makes the pledge does not affect the question or make the other a dormant partner. The only reason in this case for making the appellees dormant partners is that Shipman had the whisky in his warehouse, and the appellants did not know that the appellees had an interest in it. These appellees were not sharing the profits or interested in his general business. A dormant partner is one who takes no part in the control and management of the partnership business, but when found out is liable like the ostensible partner, and for the reason that he is a partner.

It is not pretended that the money obtained by Shipman was applied to the payment of any debts owing by these parties

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for the whisky, but on the contrary the facts show that they had paid in full for their interests, and some of them greatly more. If one is permitted to conduct a partnership in his own name and pledges the partnership property for his own debt the pledge is good, and the dormant partner, who is unknown to the creditor, will not be permitted to claim the property. No such case is presented here. Either joint owner or partner in the particular adventure had the power to sell because it was purchased to sell. They purchased openly and in the name of all, not in the name of Shipman alone, and had the whisky entered on the books of the warehouse as the property of both. They were not interested in the warehouse in any manner or in the general business of liquor dealers. Shipman's mode of doing business was known where he lived, but may not have been known in Louisville.

All the letter heads of Shipman showed him to be an agent for and wholesale dealer in certain liquors, and this indicated clearly that he had or might have in his warehouse whisky belonging to others.

This pledge was taken in Louisville by the appellants on the faith they had in Shipman's integrity. The appellants had done nothing to deceive or mislead them, and no case can be found where the joint owner or the party interested in the special adventure has been made to lose under the circumstances. The right and authority of Shipman was limited and controlled by the scope of the agreement or undertaking between them.

That was to purchase these particular lots of whisky and sell them, and no authority, express or implied, was given to Shipman to pledge for his own debts.

The cases of Lord v. Baldwin, 6 Pickering, 348; French v. Chase, 6 Greenleaf, 166, and Cammack v. Johnson, are all cases where the ostensible partner conducted the business and the other was unknown until the liabilities were created; and the court held, particularly in Lord v. Baldwin, that the ostensible partner having caused others to trust him by reason of his having the possession, use and claim as his own of the

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property, that it is liable for the debts of the ostensible partner, and in French v. Chase it was said: "Where all the creditors have trusted the man of business and the apparent owner of the goods, one of such creditors, who is behind the rest in his attachment, shall not be permitted to supplant them and gain priority because he has discovered the concealed liability of a dormant partner." The authorities referred to by counsel are where the dormant partner is enjoying the profits of the partnership business and his name as a partner not disclosed. There was no use or claim by Shipman in this case by the permission or consent of the appellees to pledge this whisky for his debts.

"Partners in a specific purchase or adventure have, in relation to that adventure, all the rights and are subject to all the liabilities of general partners, but the relationship ceases with the adventure and is confined to it" (1 Mendall, 463). One is not a dormant partner because the party who trades with the one having the possession is not aware of the fact that another is interested, if so there would be but little security in committing to others the custody of goods for sale, either as agents or on joint account. It is argued that because he has the right to sell he, therefore, has the right to pledge, and for no other reason, so far as is disclosed by the facts of the record, than that the holder of the receipts in pledge did not know that appellees had an interest.

We perceive no case of dormant partnership in these transactions, and when parties appear in a court of equity the joint owner or partner in a case like this will be entitled to the property left when it clearly appears that the partner in fault has already received more of the joint property or its proceeds than he was entitled to.

All of this whisky in controversy was covered by the purchases of Powell, Vandyke and Walker & Sons, and the bank is claiming to have received a pledge of this whisky for the same reason that appellants took the receipts, not knowing that it belonged, or any part of it, to the appellees. What

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was left did belong to the appellees, and. therefore, the appellants are not entitled to recover. It is further argued that as Powell, Monroe Walker, &c., had more than one joint purchase with Shipman, that each adventure must pay its own losses and profits. We do not see that the question is properly raised here. The joint account between them shows the nature of the transactions, and the proof is that Shipman has received his part of the whisky.

In our opinion no error was committed to the prejudice of appellants in the judgment rendered, and it is affirmed.

Geo. Weissinger and James Speed for appellants.

D. W. Lindsey, T. C. Bell and P. H. Thompson for appellees.

The following response to a petition for rehearing in the foregoing case was delivered by Judge Pryor February 14, 1884:

This case was twice argued and has been carefully considered.

The court had no difficulty on the questions presented by the petition for a rehearing, and still feel satisfied that the opinion should remain unchanged.

The case referred to by counsel for the appellants as settling the question has but little if any similarity to the present case.

Davidson & Co. were general commission merchants, and the cotton purchased by them in their own names, and then placed by them in the warehouse of the defendants at Liverpool as the cotton of Davidson & Co. The defendants made advances to Davidson & Co. on the cotton, and when Davidson & Co. failed the plaintiffs claimed to be part owners or partners. It was held they were not entitled as against the defendants making the advancements.

In the present case Shipman was the owner of a warehouse in which whisky was stored for himself and others; it was a public warehouse. He was buying and selling whisky on commission, and also buying and selling on his own account. The whisky was purchased, not in his own name, but on joint account with these parties, who are appellees in this court. The whisky was deposited in the warehouse of Shipman to the joint

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account of these joint owners or partners, and was afterwards pledged to the appellants for moneys advanced to Shipman. They were ignorant of appellee's claim. The appellants accepted the pledge at their peril. They knew or must be presumed to have known the manner in which Shipman was conducting his business. Here certain specific lots of whisky identified and purchased on joint account, and entered to the credit on the books of Shipman to their joint account, was pledged by one of the owners for his individual debt.

There was no secrecy connected with the transactions. The one party trusted as much as the other, and no credit was given to Shipman by reason of the adventure, except the possession of the whisky in his warehouse. If the possession will protect the innocent pledgee in such a case, then the claim of the appellant should prevail. Or if Shipman had purchased it in his own name and pledged it, there might be more reason for reversing this case. It would at least come within the doctrine of the case relied on by counsel.

Now it appears that Shipman has realized more than his interest in the sale of the whisky in controversy, and, such being the case in equity, the joint owner or partner must be satisfied before the individual creditors of the insolvent partner can participate in the distribution.

In this case the whisky was purchased in the joint names of the parties; was deposited in the warehouse in the joint names of the parties. In the case relied on the cotton was purchased in the name of Davidson & Co., and sent to the warehouse of the defendants in the name of Davidson & Co., and advances made to Davidson & Co. by the defendants.

Petition overruled.

Geo. Weissinger, James Speed and E. F. Trabue for appellants.

D. W. Lindsey and T. C. Bell for appellees.

MASSIE v. HIATT'S ADM'R.

(Filed September 13, 1884.)

1. Judicial sale—A posthumous child may recover her share of her father's land, sold by order of court in an action to which she was not a party, even

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from the remote vendees of an innocent purchaser at such sale. The court had jurisdiction to order the sale, but it affected those children only who were parties to the action.

2. Estoppel—She was not estopped from bringing such action by the fact that she had previously sued her guardian for her share of the proceeds of the sale.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Pryor.

Joseph M. Stapleton died intestate, leaving his widow and two children surviving him. He was the owner of a tract of land that was sold on the petition of the statutory guardian of these two infants not long after their father's death, and Will Hiatt became the purchaser, and, having paid the purchase money, obtained a deed to the land. Shortly after the death of Stapleton, and before this land was sold under the decree, his widow, being pregnant at his death, gave birth to a child called Jo Ella, who intermarried with one Crawford, and is an appellee in this action. Massie, as guardian of the two daughters living at their father's death, Mary and Sarah, obtained the judgment for the sale of their land (the entire tract) in April, 1859, and in the month of February, 1860, the commissioner of the Henry Circuit Court sold this land to Hiatt.

Hiatt, after he purchased the land, sold it to Kalfus and DeJarnett, executing to them a general warranty deed. After the birth of Jo Ella, Massie qualified as her guardian, but at no time seems to have recognized her as entitled to an interest in the estate. In making his settlement in the county court he settled as if the two children living at the death of their father were entitled to the entire proceeds of sale. Jo Ella (Mrs. Crawford) was not a party to the petition for a sale of the land, nor has she received her portion of the purchase money.

Actions had been instituted by her sisters against the guardian, Massie, and his surety for their patrimony, and she also filed a petition seeking to recover the moneys in the hands of her guardian to which she was entitled, and he seems to have had no other estate in his hands than the proceeds of the land sold under the decree of the court. During the progress of the

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litigation an action was instituted by Jo Ella (Mrs. Crawford) and her husband against DeJarnett and Kalfus, who were the vendees of Hiatt, alleging that they had just discovered that the land sold belonged to her father; that she was of tender years and knew nothing of his estate, and asking to abandon, or rather did abandon, her claim to the proceeds of the land, insisting that she was entitled to the land itself, having inherited it from her father.

This case was consolidated with the cases for a settlement of the estate, and Hiatt, the original purchaser of this land at the decretal sale and the vendor to Kalfus and DeJarnett, having died, his widow and heirs filed a petition to be made parties, alleging that they were interested in the controversy by reason of their liability to DeJarnett and Kalfus on the warranty of their ancestor in the event Mrs. Crawford recovered the land. The defense of DeJarnett, Kalfus and Hiatt's heirs was that the chancellor having the jurisdiction to sell, the whole title passed to the purchaser, and that Crawford and wife, having elected to sue the guardian in the first place, were estopped from recovering the land. There can be no estoppel in this case as against Crawford and wife unless they have done some act by which the rights of Kalfus, Hiatt and DeJarnett have been affected. They must have made some misrepresentation or concealed some fact from these parties that induced them to part with their money, or prevented them from taking such steps as would enable them to obtain relief from the parties of whom they purchased. The mere fact of bringing an action for a settlement against the guardian for the moneys in his hands can work no estoppel as against Crawford and wife, nor will they be required to stand by their original action, when it appears from the pleadings and proof that they were not aware of the existence of the proceedings for the sale of the land by Massie when they instituted their action, and, if they had been, an abandonment of that action would not work an estoppel as against their right to recover the land.

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These defendants had all become purchasers of this land at a time when the appellee was an infant, and in no condition to assert her rights.

There can be no doubt but the chancellor had jurisdiction to sell the land on the petition of the guardian, but it affected only the rights of those who were parties to the litigation. If the child had been living at the death of the father, and the statutory guardian had filed a petition in the name only of two of the children (the third child having been omitted), no title would have passed except the title of those before the court. The chancellor may have the jurisdiction to sell, but his judgment can affect only those who are parties to the action.

The General Statutes, chapter 31, subsection 7 of section 2, expressly provides that "any person born of his widow within ten months after the death of the intestate shall inherit from him in the same manner as if he were in being at the time of such death." Here was no sale for re-investment, but a petition filed by the guardian asking a sale of the entire tract, alleging that there were only two heirs, and that their interest required that a sale should be made, and before the sale was made this child was born. She was, therefore, an heir of the intestate, and entitled by descent to an interest with her sisters in this land.

The defense by the purchasers that they had no notice of the pregnancy of the mother or the birth of the child can avail nothing. The same defense might be interposed in every instance by the purchaser when a party invested with title had been omitted from the record, if permitted in this case.

If the child had an interest in the land it was not deprived of it by the proceeding instituted by the guardian to which it was not a party, for if such a ruling is adopted it must necessarily follow that if the two sisters, in whose names the land was sold by their guardian, had been adults, a conveyance by them prior to the birth of their sister would have passed a perfect title to the purchaser. The fact of such, sale having been made although in good faith and for a valuable consideration,

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would not deprive the posthumous child of all interest in her father's land.

Mr. Kent, in his Commentaries, 4th volume, page 408, says: "Posthumous children * * * inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him. This is the universal rule in this country. It is equally the acknowledged principle in the English law, and for all the beneficial purposes of heirship a child in ventre sa mere is considered as absolutely born."

In Detnick v. Mijatt, 19 Illinios, 146, it is said: "The interest of a posthumous child in real estate is not divested by a decree against his mother and uncle, under which a sale was made, to satisfy the debts of his relatives and ancestors." And in Cornell v. Smith, 23 Illinois, a posthumous child takes directly from the parent, his estate remaining meanwhile in abeyance, so that he is not bound by a decree had against the other heirs before his birth. We perceive, therefore, no reason why the appellee, Mrs. Crawford, was not entitled to her interest in the land of the father, and, the court below having so adjudged, that part of the judgment from which the purchasers have appealed is now affirmed.

Massie, the guardian, appeals from that part of the judgment by which he is required to pay to Hiatt's widow and heirs that portion of the purchase money paid him for the land to which Mrs. Crawford would have been entitled if she had been a party to the action. The recovery of this money is sought on the ground that Hiatt's widow and heirs will become liable to Kalfus and DeJarnett, the vendees of their ancestor, on his warranty of title. That liability certainly exists if assets passed to the widow and heirs, as Crawford and wife have recovered the land, but there in no evidence or allegation by either the widow or the heirs that they or either of them have satisfied the warranty to Kalfus and DeJarnett, or that they received assets from their father of sufficient value, or of any value, so as to make them responsible to the vendees for the damages sustained by the breach. They ask to be substituted to the

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rights of Mrs. Crawford, but how they can be substituted to her right when that right is to recover the land, as has been already adjudged, is not readily perceived.

The heirs of Hiatt have lost nothing so far as this record shows, and they have failed to present a case in their pleadings where their liability arises. To make an heir responsible for the debt of the ancestor it must be alleged that he has recovered assets, and to that extent only is he bound. (Hagan v. Patterson, 10 Bush, 441; Trustees v. Fleming, 10 Bush, 234; Carneal v. Day, 2 Littell, 397.)

There might be some propriety in the vendees of Hiatt looking to the remote warranty, if any exists, but in the present case the appellees, Hiatt's widow and heirs, in the pleadings were not entitled to the judgment. The judgment of Hiatt against Massie is reversed and cause remanded for proceedings consistent with this opinion. Crawford and wife are entitled to their costs against Kalfus, DeJarnett and the Hiatts. Massie is entitled to costs against the Hiatts.

W. M. Barker for appellant.

Carroll & Barbour and Masterson for appellees.

COMMONWEALTH v. ARNOLD.

(Filed September 4, 1884.)

1. Where accused on trial for murder is convicted of the lesser offense of manslaughter, and the verdict is set aside and a new trial granted at his own instance, he may, on the retrial, be convicted of the higher offense of murder.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor.

W. A. Arnold was indicted in the Garrard Circuit Court for the murder of one Robert Boyle, and when tried was convicted of manslaughter. The judgment of conviction was reversed and a new trial granted. On the second trial the accused filed a plea in bar of former acquittal as to the charge for murder contained in the indictment, maintaining that the conviction for the lesser offense, although the verdict was set aside at his

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instance, was an acquittal of the greater offense. The court below so held, and the case is brought to this court by the attorney for the State, insisting that an error was committed by the court below to the prejudice of the Commonwealth in overruling the demurrer to the plea.

Section 270 of the Criminal Code provides that "the granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict can not be used or referred to in evidence or in argument."

Some of the elementary authorities sustained by numerous decisions establish the doctrine that one indicted for murder and found guilty of manslaughter is protected from any further prosecution for murder. (Bishop's Crim. Law, volume 1.)

In such a view of the question we can not concur. Under the Criminal Code of this State an indictment for murder containing but the one charge embraces all the lesser degrees of the offense, which may be included under it, and this case may be considered as if there were several counts charging various degrees of the same offense. The Code of Practice settles this question unless the provision referred to is unconstitutional. It is manifest that by the reversal of the judgment of conviction and the granting of a new trial there is no verdict or judgment in existence acquitting or convicting the accused of any of the degrees of the offense with which he stands charged. The legislature has provided the manner in which a new trial may be had and the causes for which it may be granted, and when a conviction is had and the accused sees proper to ask for a new trial we see no constitutional objection in requiring him to submit to the conditions imposed by the statute. It is urged that such a ruling compels the accused to submit either to the verdict of manslaughter against him or subject himself to a trial for a greater offense.

While this may be true he stands convicted; and is relieved from the verdict of guilty on the condition that he consents to be retried on the charge contained in the indictment. There is

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no injustice or hardship in compelling the accused, when taking advantage of the provisions of the Code in order to obtain a new trial, to submit to the provisions imposing the conditions upon which a retrial is awarded. If a conviction for manslaughter implies an acquittal of the higher offense the accused, on his own motion, has asked the court to set aside the verdict from which this implication of innocence or acquittal of the greater offense arises. The conviction no longer exists, and when set aside it can not be used as evidence or pleaded in bar of the indictment. There is neither a verdict or judgment of guilt as to any degree of the offense.

The accused when placed on trial, the court having jurisdiction of the case, and the indictment sufficient in substance to sustain a conviction, having selected a jury, empaneled and sworn, was entitled to a verdict that would bar any other prosecution.

In this case a verdict was rendered and the accused, not satisfied, has, on his own motion, caused that verdict to be set aside. In such a case "the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection." (Cooley's Constitutional Limitations, page 401, 5th edition.)

The same author says: "If a prisoner is acquitted on some of the counts in an indictment and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those only on which he was before convicted." What effect would be given to separate verdicts on each count in an indictment, the record showing an acquittal as to one count, and a motion to grant a new trial as to the count upon which the accused was found guilty is not necessary to be determined.

A verdict of guilty of manslaughter implies that the jury did not believe the accused guilty of murder; still there is but one homicide committed, and who is the offender, and the degree of the homicide has not been ascertained. There is no

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record showing that the accused committed the offense or any fact reducing the offense, if committed, from murder to manslaughter.

The law presumes the accused innocent until his guilt is shown, and it devolves on the State to show, although the case has once been tried, that the accused committed the offense and the circumstances attending it. There was nothing in the record, after the new trial had been granted, showing that any homicide had been committed, and if there is an implied acquittal of the offense charged in the indictment, why is not the accused entitled to an acquittal for all the lesser degrees. A verdict of acquittal on an indictment for murder is a bar to any prosecution for manslaughter, and we perceive no valid reason for holding that the granting of a new trial in this case determined in effect that if the accused did commit the homicide it was done in sudden heat and passion.

In Veach v. The State, 60 Indiana, the statute of that State regulating criminal proceedings contains the same provision with reference to new trials found in our Code of Practice, and it was held where the accused had been convicted of manslaughter and a new trial granted him, he may upon the new trial be convicted of murder.

The verdict is an entirety, and we have no doubt as to the power of the legislature to prescribe for the accused the terms upon which he may have a second hearing. The court below should have sustained the demurrer to the plea. (20 Ohio State, 572; 15 Ohio State, —; State v. Morris, 1 Blackford, ——; 14 Grattan; 1 Iredell; 3 Harris.

P. W. Hardin, R. C. Warren and E. W. Hines for appellant.

W. O. Bradley and W. A. Morrow for appellee.

COCHRAN, &c. v. WALKER'S EX'ORS.

(Filed September 6, 1884.)

1. Contribution—Sureties—Limitation—The right of action between sureties for contribution arises when one surety has paid more than his share of

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the debt, and not when the debt becomes due to the principal. But if one surety pays the debt after it is barred by the statute of limitations he can not claim contribution from his co-sureties. And where an action was brought against several sureties, but was allowed to abate as to one, A, till the statute of limitations had run against the others who paid it, Held—They could not claim contribution from A.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

Henry L. Pope, a bank cashier, executed his bond as such with the appellants and one W. H. Walker as his sureties. The covenants of his bond having been broken, an action was instituted in the name of the Loretto Association and others against Pope and his sureties for the breach, the action finally terminating under the name of Davis, &c. v. McCorkle, reported in 14 Bush, page 746. All the sureties on this bond, including W. H. Walker, were made defendants, served with process and filed a joint defense.

Walker died on the 2d of May, 1872, and his death was noted of record on the 3d of May, 1872. The action was then prosecuted against the surviving parties, including his co-sureties, the appellants, resulting in a judgment against the sureties on the 17th of May, 1879.

That judgment was subsequently paid by the sureties in May or June, 1879, and this action is by them against Walker's executor and devisees for contribution.

The original action abated as to Walker on the 3d of May, 1872, and was never revived against his personal representative or devisees.

All the sureties in this bond would have been released from liability if the original creditor had failed to sue within seven years after the accrual of the cause of action, and if all right of action on the bond was barred on the part of the obligees against Walker when this judgment was rendered against his co-sureties, then, as already adjudged by this court in the case of Shelton v. Farmer, 9 Bush, 314, Walker's executors and devisees can not be compelled to contribute.

In applying the principle recognized in that case we find nothing to distinguish it from the case before us. The original

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action against the sureties had been pending for more than eight years, and seven years have elapsed from the time Walker's death was entered of record until the final judgment against his co-sureties.

It is true a judgment was rendered in December, 1875, but that judgment was suspended or superseded by the appellants, and not enforceable until the 17th of May, 1879. An attempt at that date to obtain a judgment by the obligee against Walker's executor could have been defeated by reason of the lapse of time. The right of action between co-sureties for contribution accrues when one surety pays more than his portion of the liability, and the statute begins to run from that time and not from the time the debt for which they are liable becomes due. This general doctrine recognized in all the text books is not controverted by the ruling in Shelton v. Farmer only so far as the rights of the parties may be affected by the lapse of time. It is conceded that if one surety pays the debt to his principal after the running of the statute he has no right of contribution against his co-surety so as to defeat the plea of limitation. If this doctrine is sound, and it will not be questioned, why can one surety, by prolonging the recovery in making a defense to the action or otherwise, affect the right of his co-surety, who is not a party to the action.

If the plaintiffs in the original action had revived it as against Walker's executors and devisees after the lapse of seven years, but before final judgment, they could, by pleading the statute, have prevented a recovery and obtained a judgment in their favor. With a judgment for them as against the principal it is urged that the co-surety, who had been an acting defendant from the inception of the action until final judgment, would be entitled to contribution because suit had been instituted by the principal obligee against all the parties before the running of the statute. Walker was a party to the action and had united in the defense, but when the action was dismissed as to him or had abated by reason of his death the statute ran, there being no revivor, as if Walker had never been served

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with process. We are aware of the rule laid down by Mr. Brandt in his work on Suretyship, and have examined the decisions referred to by counsel sustaining that view of the question, "that when suit is commenced against one surety before the running of the statute, the fact that the claim is barred as to the obligee before judgment or payment by the surety does not affect his right to contribution."

Still we are unable to see the reason for such a rule when, by express statute, the means is afforded the surety who is sued of compelling the obligee or the parties suing to bring all the obligors or sureties before the court. While the obligee is not compelled to delay asking a judgment until all are served, it preserves the right of action, and if one of the sureties or obligors should die before judgment or during the pending of the action, as we construe the statute, those of the obligees or sureties before the court can compel a revivor. Section 11 of chapter 104 was enacted for the protection of sureties and should be construed so as to carry out the legislative intent, and in considering the case of Shelton v. Farmer that provision, or one similar in the Revised Statutes, was before the court, and the decision controlled by the construction then given it. Section 241 of Brandt on Suretyship refers to Shelton v. Farmer, and says that the surety was released from contribution "because the surety who was sued had a statutory right to have compelled a suit to be brought against the other surety." If the surety sued has no remedy enabling him to have all the parties (his co-sureties) brought before the court, there is a stronger reason for the adoption of the rule contended for by counsel for appellants, but then the reason for such a doctrine is neither satisfactory nor conclusive.

As a general rule when the obligee is barred from recovery against a surety by reason of the lapse of time, his co-surety should not be allowed to pay the debt so as to make his co-surety contribute. The cases cited by counsel, but few of them if any, are based upon the construction of statutes for the protection of sureties, and if they were we would be reluctant, and ought not at this late day to reconsider the rule

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of construction or the doctrine recognized in Shelton v. Farmer. That opinion was delivered for publication at the winter term, 1872. It has doubtless been followed by this and other courts of the State in determining the liability of sureties the one to the other, and, having been established as a precedent for nearly twelve years, we can see that no good, but much harm, might result in now disregarding a rule so long established.

All other decisions in courts inferior to this court have been required to conform to it, and as said in Tribble v. Taul, 7 Monroe, 455: "It is of greater importance that a rule should be uniform and stable than that it should be the best possible rule adopted."

The judgment below is, therefore, affirmed.

I. & J. Caldwell & Winston, Hamilton Pope, R. & L. Buchanan and Bijur & Davie for appellants.

Barrett & Brown for appellees.

CALLAHAN, &c. v. BANK OF KENTUCKY.

(Filed September 23, 1884.)

1. Bills and Notes—Endorser—A note in the hands of the maker endorsed by the payee is presumed to have been paid, but the presumption is otherwise where the endorsement was made by the payee for the maker's accommodation and to enable him to get it discounted.

2. Notice—Where the endorser of a bill makes an assignment for the benefit of creditors, notice of dishonor given to the assignee only is sufficient.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

The firm of W. L. Weller & Son on November 15, 1877, executed a note for $3,500, payable to the order of James Callahan at the Bank of Kentucky four months thereafter. The latter indorsed it in blank and delivered it to said W. L. Weller, who also indorsed it in blank and discounted it to the appellee before its maturity, thereby putting it upon the footing of a foreign bill of exchange.

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The proceeds were drawn out of the bank by W. L. Weller, but for the use of said firm—in fact the entire transaction was for its benefit, Callahan being merely an accommodation payee and indorser.

Before the maturity of the note W. L. Weller & Son had been adjudged bankrupts; and the appellant, Callahan, being heavily embarrassed, but not in fact insolvent, made an assignment of property for the benefit of his creditors to the appellant, Harry Stucky. The deed described certain realty embraced by it, and apparently conveyed the entire estate of the grantor to the assignee.

It expressly so stated as to his personalty, save the portion that was by law exempt to him as a housekeeper; and provided that after the payment of all his debts and liabilities and the expenses of the trust the trustee should transfer any balance of the trust property left in his hands to Callahan's wife.

The testimony shows, however, that the deed of trust did not cover two tracts of land then owned by Callahan, and that after the payment of all his indebtedness there will be left at least $40,000 in the trustee's hands.

The note not having been paid at maturity was protested for nonpayment, and notice of protest duly given to Stucky as assignee, but none was given or sent to Callahan, although he continued to reside and transact business at the same place; and in fact he does not seem to have had any notice or knowledge of the dishonor of the paper until long after its maturity.

The assignee, Stucky, brought this suit to settle his accounts, making the appellee a defendant; and it having by its answer, counterclaim and cross petition asserted the note, both against Callahan and the trust estate, the court below rendered a personal judgment for it against the one, and adjudged that it be paid pari passu out of the other with the general debts of the estate.

Two questions are presented for our decision:

First. Did the indorsement by Callahan and the delivery of the note by him to W. L. Weller, one of its makers, extinguish the debt?

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Second. Was the notice to Stucky sufficient to charge Callahan; or was the latter released as indorser because notice of protest was not given or sent to him?

The law presumes that a note in the hands of the maker of it, indorsed by the payee, has been paid; and one to whom the maker has discounted it can not recover against the indorser unless it was indorsed for the maker's accommodation. (Callahan v. First National Bank of Louisville, 78 Ky., 604.

Weller & Son, however, did not indorse this note to the appellee. It never came to the hands of the makers after its indorsement by Callahan, but to that of W. L. Weller alone, and he alone indorsed it.

The firm had an account at the bank, but the proceeds of the note were placed to his individual credit, and drawn out upon his individual check.

The firm account was distinct from his individual account.

If, however, the possession of the note and its being discounted by one of the makers after its indorsement by Callahan could be considered as equivalent in law to such possession and action by the firm, or even if it had then come to the possession of the firm and been indorsed in its name, the debt would not have been extinguished in this instance, as it was not so intended.

When the answer of the appellee was drawn the words: "Pay the within to the order of W. L. Weller" were written over the indorsement of Callahan, and the words: "For value rec'd pay to Prest., Direc. and Co. of Bank of Louisville," over that of Weller.

It alleged that the note was indorsed in blank by Callahan, and given to W. L. Weller with authority to discount it for the use of W. L. Weller & Son; that Weller indorsed his name on it, and discounted it for value to the bank in the usual course of business and before maturity, and that the proceeds were paid to said Weller.

But by an amended petition it was stated that the note was made payable to Callahan and indorsed by him for accommo-

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dation, and, as he then knew, to enable Weller & Son to discount it to the appellee; that the name of W. L. Weller was indorsed upon it simply for convenience, and in order that the money might be placed to his credit in bank and drawn out upon his check, thus saving the trouble of placing it to Callahan's credit and then procuring his check upon which to draw it; and that the bank discounted it upon the faith of Callahan's indorsement.

These allegations are fully sustained by the testimony, and the court, therefore, correctly permitted the appellee upon the trial to strike out said assignments over the names of Callahan and Weller, and to write over the name of Callahan an assignment of the note to the bank; and did not err in deciding that the possession and indorsement of it by W. L. Weller, after its indorsement by Callahan, did not extinguish the debt. (Long & Robertson v. Bank of Cynthiana, 1 Littell, 290.)

The failure to notify Callahan of the dishonor of the paper presents a more troublesome question. After a careful review we have been unable to find any exact precedent.

The contract of an indorser is that the maker of the note or drawee of the bill will pay it, if it is presented at maturity and payment demanded; and if he does not, that then the indorser will pay it, provided he is duly notified of its dishonor.

The undertaking is collateral and conditional. The indorser has a right to fix the terms upon which he will be bound; and, having done so, the holder of the paper can not alter them, and must comply strictly with them.

It is a condition precedent to the liability of the indorser that he shall be duly notified of the nonpayment of the paper.

The certainty of this rule creates security and stability in commercial transactions. Its object is to put the party on the alert, and, by notifying him that his estate will be held liable, to enable him to look to the party in front of him.

In the case of a bankrupt drawer or indorser the law is not well settled whether notice of protest is to be given to him or the assignee, or to both of them.

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The language of most of the text writers upon this point is singularly uncertain.

Parsons says: "If a person entitled to notice be bankrupt, notice should be given to him if his assignees are not yet appointed. If they are, notice should perhaps be given to them if the fact of their appointment is known to the holder or might be known by him by the exercise of due diligence, but notice might perhaps even then be sufficient if given to the bankrupt. Under our State insolvent laws, and wherever the point has not been settled by decision or a positive usage, it would seem to be the safest course to give notice, both to the insolvent and to the assignees also. If the insolvent has absconded notice should be given to the assignees; and if they are not appointed we should suppose that a delay until their appointment would not discharge anyone; and, although notice may be given to anyone holding or representing the estate, we should think it better to notify the assignees when appointed." (1 Parsons on Notes and Bills, page 500.)

The language of Story is: "If the party entitled to notice has become bankrupt and assignees have been chosen or appointed, notice to the assignees is proper and will be sufficient;" but he also says: "If any of them are bankrupt notice should be given to them and to their assignees, if any are appointed; otherwise to the bankrupts themselves." (Story on Bills of Exchange, sections 305, 389.)

Another writer uses thus language: "If the party entitled to notice be a bankrupt notice should be given to him before the choice of assignees, and after such choice to them." (Chitty on Bills, page 228.)

"If the drawer of the bill," says Mr. Byles, "become bankrupt notice must, nevertheless, be given to him—at all events before the choice of assignees. If the assignees are appointed perhaps notice should be given to them." (Byles on Bills, page 216.)

The language of another leading authority is equally cautious. He says: "If the party be bankrupt it is best to give

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notice to him and to his assignee also. If there be yet no assignee appointed notice to him is sufficient, and perhaps it might be sufficient even if one had been appointed. If given to the assignee alone it would probably be sufficient." (Daniel on Negotiable Instruments, section 1002.)

The weight of authority seems to be that notice to the assignee of a bankrupt is sufficient; and by analogy the rule should be the same as to the assignee of an insolvent. It is true that a bankrupt and an insolvent do not stand upon exactly the same footing. The former may be discharged from liability for his debts, while the latter can not be; and the former can not be sued, while judgment may be obtained against the latter; but yet the main object of requiring notice to be given of the dishonor of negotiable paper is that the indorser may protect his estate by enforcing payment against or obtaining security from those liable to him upon it; and the rule as to notice should be the same, whether the estate has passed into the control of an assignee by a voluntary conveyance or by operation of law.

In the one case the debtor selects a person to take charge of his estate and distribute its proceeds to his creditors; while in the other the same end is accomplished by operation of law. If notice to the assignee of the bankrupt is sufficient because he is the representative of the estate, then the same reason applies with equal force to an assignee under a voluntary conveyance; and although the deed from Callahan did not in fact transfer his entire estate, yet it must be treated as a general assignment in considering this question.

We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not to the assignee, would or would not be sufficient, as that question is not presented in this case; but it seems to us that it is consistent with both reason and law, and necessary to the usefulness of commercial paper, that when one person by an assignment of his estate has placed it and the settlement of his debts in the control of another, that a notice to the latter of the dishonor of paper should be sufficient.

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It is urged, however, by the distinguished counsel for the appellants that even if this be so, yet Callahan was entitled to a personal notice because he did not in fact assign all of his estate; was not in fact insolvent; and only created a trust on the larger portion of his property to secure his creditors.

By the deed of assignment the assignee was to take control of the property; rent all or any of the real estate, and collect the rents; receive and collect the personal estate; compromise claims against the estate; insure it; investigate all demands against Callahan before recognizing them as valid, and determine the extent of his liabilities; avoid litigation as far as possible, and settle all his indebtedness. In all this work Callahan was to aid the assignee.

Evidently the purpose and intention was to give the assignee full power as to the liabilities of the grantor. As to them he represented him as fully as if he had been his personal representative. He had full power as to their settlement; and it was given, not because Callahan was insolvent, but because he desired to place his affairs in the hands of some one who was competent to manage them in their confused condition.

Under the form of a deed of assignment for the benefit of his creditors he made Stucky his general representative as to his indebtedness, and while an agent to receive and discharge debts may not have the power to accept or indorse bills so as to bind the principal, yet it is well settled that notice of their dishonor given to a general agent is valid as to the principal (Daniel Neg. Insts., volume 2, section 998; Byles on Bills, page 293; Parsons on Bills, volume 1, page 499; Fasson v. Hubbard, 55 N. Y., 465), and a general agent is one whom a man puts in his place to transact all of his business of a particular kind.

Wherefore, the judgment is affirmed.

Lane & Harrison and Bijur & Davie for appellants.

Goodloe & Roberts for appellee.

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COMMONWEALTH v. PREWETT.

(Filed September 23, 1884.)

1. Under an indictment for robbery the accused may be convicted of larceny; the two offenses differ in degree only.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Hines.

This is an indictment charging robbery, with evidence tending to show larceny. From a verdict of acquittal the Commonwealth appeals in order to establish the law for guidance in future cases. The court properly instructed the jury as to what constitutes robbery, but refused to instruct that if the accused was found to have been guilty of larceny, they might affix the penalty prescribed for that offense. The question presented is whether larceny is a degree of the offense of robbery. The Code provides, section 262: "Upon an indictment for an offense consisting of different degrees the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment." Section 263 provides: "The offenses named in each of the subdivisions of this section shall be deemed degrees of the same offense, in the meaning of the last section." The third subdivision of that section is: "All offenses of larceny."

Our statutes do not undertake to define either robbery or larceny. For their meaning we must have recourse to the common law. Blackstone defines robbery, which is the rapina of the civil law, to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear. This is designated as mixed or compound larceny. Simple larceny is the felonious taking and carrying away of the personal goods of another. Choses in action, such as bonds, bills and notes, not importing any property in possession, were held not to be the subject of larceny. Hence our statutes making the taking of such things larceny. The principal ingredient in each is the taking of the personal

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goods of another, without his consent and with the intention on the part of the one taking to convert them to his own use. Larceny is the generic term, robbery being specific and of a higher grade than simple larceny because of the element of force or fear entering into it, larceny is of a lower degree of the same offense as that charged in the indictment, and, therefore, punishable under the Code as quoted. The court below erred in not instructing the jury that under the indictment for robbery a conviction for simple larceny might be had.

Finley Shuck for appellant.

STEPHENSON v. THE PHŒNIX INS. CO.

(Filed September 16, 1884.)

1. Insurance—Where one has taken out a policy of fire insurance containing a provision making it void if the insured should take out other policies, and he subsequently takes out a second policy, having a similar provision against his then holding or afterwards taking out other insurance, he can not recover on the first policy on the ground that the second forbidding other insurance was void ab initio by reason of the existence of the first and was, therefore, in reality no violation of the first. These provisions against other insurance are for the benefit of the insurer, and not void but voidable at the latter's option.

Appeal from Scott Court Common Pleas.

Opinion of the court by Judge Lewis.

This is an action by appellant to recover of appellee $3,000, amount of a policy of insurance issued October 25, 1877, for one year on a dwelling house destroyed by fire.

In the policy is contained the following condition: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * then in every such case this policy shall be void."

In defense of the action it was alleged that on the same day, but after the policy was issued, the plaintiff, in violation of that condition, without the consent of the defendant written on the policy, procured from two other companies policies of

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insurance on the same property, aggregating $6,000, to continue in force during the same period.

In reply it was admitted that the plaintiff did procure other insurance on the property without the defendant's consent, as alleged in the answer, but it was stated that the defendant had notice thereof and waived its right, and was estopped to claim a forfeiture of the policy.

Upon the issue as to waiver made by the pleadings a verdict in favor of the plaintiff in the action for the amount sued for was rendered and judgment entered accordingly. But upon appeal to this court the judgment of the lower court was reversed and cause remanded for a new trial, it being held in the opinion rendered that there was no evidence offered which was proper to go to the jury on the question as to waiver of the forfeiture, and that the motion for nonsuit should have been sustained. (Phœnix Ins. Co. v. Stevenson, 78 Ky., 150.)

Upon the return of the case the plaintiff in the action was permitted by the court to file two amended replies, in which it was in substance alleged that in each of the two policies procured by him, after the one issued by the defendant, was contained a like condition as to previous and subsequent insurance of the same property by other companies; that those policies were issued to him without any notice to or knowledge on the part of either the two companies issuing them of the prior insurance by the defendant until after the house insured was destroyed by fire, and that the two policies being thus rendered invalid by the plaintiff's breach of condition contained in them, there was in fact no violation by him of the condition contained in the policy sued on.

The case is now before this court upon appeal from the judgment sustaining a general demurrer to the amended replies and dismissing the petition.

The question presented by the amended replies has heretofore been passed upon by this court in the case of Luggs v. Liverpool, London and Globe Ins. Co., MS. opinion.

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In that case the court in rendering the opinion used this language: "Appellant contends that the last insurance was absolutely void, and left the first in full force. He is wrong in any aspect of the case: First, the second insurance was not void, but voidably only at the option of the insurer; and, second, if it were void ab initio that fact would not relieve appellant from the forfeiture resulting from a violation of the stipulations in the first policy against additional insurance."

It is thus obvious that if the opinion in that case is to be adhered to the judgment sustaining the demurrer to the amended replies must be affirmed.

Counsel for appellant refers us to several authorities holding a doctrine opposite to that announced in the opinion referred to by this court, and perhaps the weight of authority in this country may sustain him. But on the other hand the decision of this court is supported not only by the Supreme Court of the United States and several State courts, but by principle and reason.

In the case of Baer v. The Phœnix Ins. Co., 4 Bush, 242, where the question arose as to the proper construction to be given to a similar condition contained in a policy of fire insurance, this court said: "The object of that condition was to assure the underwriter against over insurance, or insurance equivalent to the entire risk, whereby the insured, relieved of all risk, might be tempted to procure the loss, or to take no care to prevent it. To make it the interest of the insured, as well as the insurer, to avoid loss no prudent underwriter ever insures for the full value of the property, but leaves the owner so far interested in preventing the loss as to assure his fidelity and vigilance in proper care to avoid it."

This precaution on the part of insurance companies is not only justifiable, but indispensable to their success, if not existence. For without such provision against cumulative insurance fraud and bad faith on the part of the insured would be encouraged, and the legitimate and useful purposes of fire and marine insurance to a great extent defeated.

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A contract of insurance, like any other which the law sanctions, should be enforced by the courts according to its terms and conditions. In this case a plain and vital stipulation which the insurer had the right to insert in the policy and which the assured, understanding or having the opportunity to understand, agreed to, has been deliberately violated by the latter. And he now seeks to avoid the forfeiture which results from such violation, and is now claimed by the insurer, upon the ground that the two subsequent policies being rendered invalid by like breach of contract and of faith on his part, the first one is now valid and enforceable by either party to it.

But it has been held by this court in the two cases of Baer v. The Phœnix Ins. Co., and Luggs v. Liverpool, London and Globe Ins. Co., that a violation by the assured of such a condition in a policy of insurance does not render the policy absolutely void, but simply voidable, to be treated as void by the insurer at his own exclusive option.

The correctness of this ruling is in our opinion so manifest that it is needless to enter into an extended discussion to support it. For to hold a contract of insurance that has been violated by only one of the parties to it void, or in the language of the pleadings invalid as to both, is to put it, after making the contract, in the power of either party to render it a nullity by simply violating some one of its conditions.

The two policies referred to in the replies, which were obtained subsequent to that issued by appellee, should not, therefore, be held as void or invalid, but only voidable at the option of the companies issuing them. How they have been treated by the parties the record of this case does not show, nor is it material. For they were procured by appellant either with the intention to defraud appellee, or in ignorance of the fact that in obtaining them he was violating his first contract, and incurring a forfeiture of his first policy. And in either case we are forced to conclude he intended to avail himself of cumulative insurance, and, therefore, was exposed to the temptation

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to bring about the loss of his property, or at least was rendered less careful to prevent its destruction.

The object of the condition mentioned was thus defeated by the conduct of appellant, and the risk of appellee increased without its knowledge or consent.

When a contract is plain, unambiguous and fair, not vitiated by fraud nor mistake in its execution, the courts are not authorized to make for the parties to it a different one, or to construe it contrary to its express terms, especially when the consequence may be to enable one of the parties to profit by his wrongful violation of it.

The judgment is affirmed.

W. S. Darnaby for appellant.

Jas. E. Cantrill, Jas. F. Askew and Lincoln, Stephens & Slatterly for appellee.

COMMONWEALTH v. OFFUTT.

(Filed September 25, 1884.)

1. Pardons—Officers' commissions—Where the amount due on a forfeited bail bond was remitted by the governor before judgment, neither the Commonwealth's attorney nor clerk are entitled to commissions. They can claim commissions only where judgment is rendered and collected.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Hines.

Appellee, being surety on a bail bond, was summoned to show cause why judgment should not be entered against him on the forfeiture. For answer he filed a remission by the governor, containing these exceptions: "Commissions, fees and cost." The Commonwealth's attorney then moved the court for judgment for his commissions, amounting to $120, and for the commissions of the clerk, amounting to $40. The court overruled the motion and entered judgment for the Commonwealth's costs only. From that judgment this appeal is taken, and the only question is whether the Commonwealth's attorney and

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clerk are entitled to any commission until judgment has been rendered on the forfeiture.

Section 5 of article 4, chapter 5 of General Statutes, provides "that hereafter the attorney for the Commonwealth shall receive, to his own use, thirty per centum of all judgments rendered in favor of the Commonwealth in the several courts of his district." Under an act approved April 19, 1882, circuit court clerks are entitled to ten per centum "of all fines and forfeitures which may be hereafter paid by virtue of any judgment rendered in favor of the Commonwealth." The provision of these statutes clearly contemplate that the Commonwealth's attorney and the clerk shall be entitled to commissions only upon the condition there is a judgment, and that the judgment is collected in whole or in part. Where the whole of the judgment is not collected they are entitled to their pro rata part of that collected.

Judgment affirmed.

P. W. Hardin for appellant.

FONTAINE v. DUNLOP.

(Filed September 25, 1884.)

1. Dower—Seisin—Where a guardian having power given him by will to sell his ward's land makes a contract for the sale of it, and gives bond for title to the purchaser, and the ward subsequently marries, his widow, after his death, can not claim dower (he never having been seised during coverture), and especially not in a case where he made a deed after his marriage and when of full age, ratifying his guardian's contract.

2. Where one has power to convey it is immaterial that he describes himself improperly, e. g., as executor instead of guardian.

3. A married woman, who is an infant, does not relinquish her dower by joining in her husband's deed, but she is bound by its recitals in her suit for dower.

4. Deeds—Evidence—Recitals in one deed of another deed are evidence, where the original is lost, as against a party or one claiming under him.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

Aaron Fontaine, sr., devised 250 acres of land to his four children, Alexander, Henry, Emeline and Aaron B. Fontaine.

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At his death in 1823 they were all infants, the eldest not becoming of age until March 19, 1827.

The will nominated three persons as his executors—only one of whom, however, ever qualified—and also appointed them the guardians of said four children, with almost unlimited power over his estate.

Among other things it provided: "And to those gentlemen as guardians to my said children, or the survivors or survivor of them, I give full power and authority to sell, rent, or otherwise dispose of the plantation whereon I live devised to my four children whenever they may think it best for the benefit and advantage of my said four children or the survivor or survivors, and in all other things to do whatever things as guardians as aforesaid they may think best."

While all the children were yet minors the acting executor and guardian, with the advice and consent of the two that had never qualified or accepted the trust, sold the land by executory contract to one Jewell, and gave him a bond for a title.

The purchase money was all paid and said devisees received the benefit of it.

They also upon becoming of age made deeds of confirmation to said Jewell, with the exception of Emeline, who had died, and Jewell having sold the land to one Pope, said three persons named as executors and guardians conveyed the land to him on December 15, 1835, by Jewell's request.

In 1832, and after the sale by executory contract to Jewell, the appellant and Aaron B. Fontaine intermarried, and he having died on August 29, 1880, she brought this action on December 13, 1880, to recover dower in the one-fourth of said 250 acres of land, and which fourth is now owned by the appellee, Dunlop.

The court below disallowed her claim, and she is now, by this appeal and in an equitable action, asking a reversal of its action.

The fact that she united with her husband in two deeds of ratification of the sale to Jewell does not bar her of relief, if

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she is otherwise entitled to it, because, when she did so, she was a minor, and she has relied upon this fact in her pleadings to escape the effect of her action.

The fact, however, which is fatal to her claim is that at the date of her marriage her husband was not beneficially seized of the land, and Jewell was then the equitable owner of it. (Oldham v. Sale, &c., 1 B. M., 76; Gains v. Gains, &c., 18 B. M., 107; Gully v. Ray, 9 B. M., 295.)

In the cases cited the husband had, before marriage, sold his land by executory contract, either verbal or written, and conveyed it afterwards; and in this instance the executor or guardian having the power to sell, and doing so, was equally as efficacious to deprive the appellant of dower as if it had been sold by executory contract by her husband when of age and before their marriage.

It has been held that if a man before his marriage sells his land, even by parol, and then conveys it after marriage, that upon his death the widow is not entitled to dower; but in this instance there was a sale before the marriage by a written contract by one who had the power to make it, and the husband of the appellant received the benefit of it.

Although but one of the three persons named in the will as executors qualified, and although he alone accepted the trust of guardian, yet the other two approved the sale of the land, and united in it to show their approval; and where a discretionary, naked power to sell land is given by the testator to executors eo nomine, the acting executor may alone execute it. (General Statutes chapter 39, section 9; Ross v. Rice's Ex'or, 3 Dana, 190.)

It is true that in the deed made by them the persons named as executors and guardians in the will styled themselves as executors alone; but the same persons named as executors were also named as guardians in the will, and the reference to it in the deed gave notice of the authority under which they were acting; and the failure of one executing a power to give his proper title does not vitiate his action, if he is in fact the proper one to execute it. (Perry on Trusts, section 511, c.

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The sale by the executory contract, however, and not the subsequent deed, must determine the rights of the appellant, and if this were otherwise the appellant could not avoid the effect of her husband having, after he became of age, ratified the sale and deed by joining in as many as three confirmatory deeds.

It is urged that the sale by executory contract to Jewell is not shown, as the recitals in the deed by the executor and in the confirmatory deeds by the devisees are the only evidence thereof; and that they were incompetent for this purpose.

It will be seen by an examination of them that they recite the fact that the sale was made; and the confirmatory deeds by the devisees refer to and speak of the deed made by the executor to Jewell, wherein the history of the sale is fully recited; and not only the husband of the appellant, but the appellant herself united in two of these deeds; and while, owing to her nonage, she is not thereby concluded, yet their recitals and the recitals in the deeds to which they refer are competent evidence to show the sale by executory contract, because they are not only appellant's statements, but those of her deceased husband, through whose title she is now claiming dower.

The verified answer of the appellee alleged that the bond to Jewell had been lost, and the statements of the deeds, sanctified by the lapse of nearly a half a century, show that the appellant is not entitled to the relief asked by her.

The recital of a deed in another deed is evidence of the recited deed, if the original is lost, against the party who executed the reciting deed or against any person claiming under him. (1 Phillips on Evi., 457; Oldham v. Sale, &c., 1 B. M., 76.)

The land in contest is now in the hands of an innocent purchaser, who has fully paid for it, and equitable consideration as well as legal rules forbid that he should be disturbed.

Wherefore, the judgment is affirmed.

B. F. Camp for appellant.

Brown & Davie for appellee.

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SCOTT v. SCOTT'S EXECUTRIX.

(Filed September 27, 1883.)

1. New trial—Where an issue has been fully investigated and a judgment entered a new trial will not be granted upon the discovery of evidence found in the possession of a witness whose deposition has been already taken, unless such evidence disproves the judgment on the former trial or is inconsistent with it.

2. New trial, time of filing petition—A petition for a new trial on the ground of newly-discovered evidence must be filed with the clerk before the commencement of the second term after the discovery, and long enough before to allow time for summons to issue and be returned for trial at that term.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Lewis.

In 1867 Thos. B. Scott commenced an action against John D. Scott on an account amounting to about $7,000, for money alleged to belong to the former, and to have been collected by the latter at different times between the years 1862 and 1865, but never paid over or accounted for.

The defendant in his answer admitted the collection by him of a portion of the money mentioned, but alleged that he and the plaintiff in 1850 formed a partnership in the farming and milling business that continued until 1859, and that upon a settlement of the partnership and the allowance to him of all the credits to which he was entitled, some of which had not been given him in the account sued on, the plaintiff would be indebted to him.

In his reply the plaintiff denied the allegations of the answer in respect to the partnership and the credits claimed by the defendant.

In 1871 Thos. B. Scott died, but the action having been transferred to equity was revived in the name of his executrix.

In October, 1873, judgment was rendered by the lower court sustaining the exceptions of the defendant to the master commissioner's report, so far as to disallow the account sued on, and directing it to be so amended as to allow to the defendant credits and assets to the amount of the account.

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But upon appeal to this court that judgment was reversed, and at the August term, 1878, of the lower court judgment was, in pursuance of the mandate of this court, rendered in favor of the plaintiff in the action for the sum of $6,567, subject to credits amounting to nearly $800.

On the 14th day of February, 1880, John D. Scott filed a petition against the executrix of Thos. B. Scott, deceased, for a new trial of the original action, upon the alleged ground that in the latter part of February, 1879, he had discovered for the first time evidence material for him, which he could not by reasonable diligence have discovered and produced at the trial; which newly discovered evidence consisted of a paper in the possession of one Oliver Perry, in the handwriting of Thos. B. Scott, purporting to give a list of notes and checks having different dates from 1853 to 1859, one of the notes being classified as "individual notes" and the others as "joint notes."

A general demurrer was sustained to the petition and judgment rendered dismissing it, and from that judgment this appeal has been taken.

One of the principal issues of fact tried in the original action was whether there was a partnership between Thos. B. and John D. Scott, as alleged and attempted by the latter to be proved. And it is contended that the paper referred to and now in the possession of Perry is evidence of that fact.

The litigation between these parties commencing in 1867 and continuing about six years, until the first judgment was rendered, was not only protracted, but seemingly hotly contested if not bitter, there having been taken depositions of a great many witnesses, more than half of which related to issue as to the alleged partnership.

In the opinion rendered by this court it was said: "The character and terms of the agreement between the parties is nowhere proved, and the weight of the testimony conduces to establish the theory assumed by appellant's counsel that the appellee was entitled to a portion of the net profits resulting from their joint labor;" and further: "The partnership is at-

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tempted to be proved by the declarations of Thomas and by the action of both in conducting the farm and mill, but what the partnership was or the agreement between the parties is not shown, and no chancellor will divest a party of his title to land or the proceeds of the sale of land upon this character of testimony, and more particularly when the proof by which the claim is asserted is refuted by facts and circumstances, the existence of which can not be doubted."

Not only was an immense volume of testimony taken bearing upon this issue, but the deposition of the witness, Perry, who married the sister of Thomas and John D. Scott, was twice taken, and we are bound to presume that as thorough and searching investigation has already been made as it is possible to make.

The petition was filed in this case more than thirteen years after the original action was commenced, and the litigation now sought to be reopened relates to transactions occurring more than thirty years ago.

There is no written contract of partnership, nor can it be pretended the newly-discovered evidence establishes the fact of such partnership. On the contrary it is entirely consistent with the theory adopted by this court that appellant, Jno. D. Scott, was simply entitled to a portion of the net profits, the title to the real estate being in Thomas B. Scott.

That there should be four or five joint notes belonging to them does not necessarily or even probably establish the fact there was a joint ownership of the real estate, or a co-partnership in the farming and milling business existing between them. So that even if the paper now produced and relied on had been before the court when the case was decided it would not, added to the other testimony, have been sufficient to establish the partnership.

But there is a still greater obstacle in appellant's way.

Section 344, Civil Code, provides that "if grounds for a new trial be discovered after the term at which the verdict or decision is rendered the application may be made by a petition

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filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as in other petitions, requiring the adverse party to appear and answer it on or before the first day of the next term."

In our opinion but one construction can be given to this section in respect to the time at which the petition is required to be filed, and that it must be filed with the clerk the length of time before the second term after the discovery necessary to allow summons to be issued and returned for trial to that term.

The petition is not required to be filed in open court during the term, but, like other petitions, it must be filed before the clerk. Therefore the meaning of the requirement for the petition to be filed not later than the second term is that it shall be filed before, and the action shall stand for trial at that term.

There is no reason for longer delay than the second term after the discovery.

In this case the discovery having been made in February, 1879, the petition should have been filed previous to the February term, 1880, and it was too late to file it during that term.

Wherefore, the judgment is affirmed.

W. D. Hopper, W. P. D. Bush and W. Lindsay for appellant.

J. S. Bronaugh and Anderson & Herndon for appellee.

SUPERIOR COURT OF KENTUCKY.

McMURTRY v. KENTUCKY CENTRAL R. R. CO.

(Filed September 3, 1884.)

1. Interest—A passenger holding a ticket entitling him to safe transportation between certain points on a railroad was seriously injured through the negligence of the road, Held. His action is for breach of contract, and the judgment for damages will bear interest.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Bowden.

The appellant sued the appellee, alleging that "the defendant, for the regular rate of fare, to wit, twenty-five cents,

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charged by them for the transportation of a passenger from Robinson Station to Cynthiana, another station on said road, then and there paid by the plaintiff to the conductor of defendant's train, agreed with plaintiff to transport him carefully and safely over its said road between the places aforesaid, or from the first-named station to the last-named on the train on which plaintiff had engaged passage, to wit, the regular day freight and passenger train bound south on said road on said day, and passing said station about noon. Plaintiff says that the defendant, not being mindful of its duty in the premises and under its contract with plaintiff, did, by the carelessness and negligence of its officers, hands and agents, whose duty it was to attend to the making up and controlling of said train, so carelessly and negligently run and operate said train that the same was wrecked at a point about one and a half miles north of Cynthiana, in Harrison county, and the car in which plaintiff was riding and had engaged passage was thrown from the track and wrecked, and in said wreck plaintiff's foot was mashed, broken and seriously and permanently injured, whereby the plaintiff was put to great expense, loss of time, and subjected to great pain and suffering and permanent disability. * * * He says that by the infliction of the injury and wrong aforesaid he has been damaged in the sum of $10,000, no part of which has been paid."

These allegations were repeated in a second paragraph, except that the carelessness was alleged to be gross, wanton and reckless.

The answer denied the imputed negligence and the extent of the injury alleged, charging that plaintiff contributed to the injury by negligently being at an improper place on the car, which the plaintiff in his reply denied.

On the trial the court instructed the jury that the defendant company admitted its contract to carry the plaintiff from Robinson Station to Cynthiana, and that the train on which plaintiff took passage was wrecked between those points, and that plaintiff was injured thereby. It then submitted to the jury to find whether the injury was caused by the carelessness

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of the defendant only, directing compensatory damages for the plaintiff if they so found. They returned a verdict for the plaintiff, awarding him $8,000, whereupon it was "adjudged that the plaintiff recover of the defendant the sum of $8,000 and his costs herein expended." On appeal that judgment was affirmed. The company then paid to the plaintiff's attorney the entire amount then supposed to be due, including $1,472, being interest at 6 per cent. on the amount of the judgment from its date.

This action was begun to recover that amount with interest on the supposition that the judgment did not carry interest. A demurrer to McMurtry's answer having been sustained, a judgment was rendered against him for the amount of interest he had received, and he appeals.

The answer, adjudged bad on demurrer, alleges that Mr. McMurtry instituted a suit against the company for the damage sustained by him by reason of the plaintiff's violation of a contract made with him to carry him carefully and prudently over its road; that the company carried him so negligently as to inflict great injuries on him, and the action was to recover damages for that failure. But as the record of that case was made part of the pleadings in this case we must look to it to ascertain the nature of the action in which McMurtry recovered his judgment.

The petition was obviously prepared on the assumption that by reason of the compensation paid the company, as a common carrier, was under a contract obligation to carry the plaintiff with care and skill. It alleges its agreement, and the consideration for it, and then alleges the acts of negligence as a breach of that agreement. Nor can there be any doubt that the company, receiving the fare prescribed to be paid for conveying a passenger from Robinson Station to Cynthiana, thereby impliedly contracted with McMurtry that it would endeavor to perform its contract with care and skill. It is equally clear that if it failed in care and skill, and thereby inflicted an injury on McMurtry, he could recover damages for

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the violation of the contract sufficient in amount to compensate him for the injury done him. Nor can he be deprived of his right to look to his contract for compensation by the fact that the carelessness was excessive, even to the extent of being wanton and reckless. It is true he can not acquire the right to punitive damages; suing on his contract, by reason of excessive carelessness; and, therefore, we do not suppose that the second paragraph of his petition differed, in legal effect, in any degree from the first. There was no effort in either to get more than compensation. Nor did the court permit the jury to go further.

But the appellee insists that at common law no judgment bore interest, and that the statute does not permit a judgment *for* an "injury to the person" to bear interest.

It is true that, independent of statutory provision, no judgment carries interest. The first statute in this State was that of 1812 (M. & B., 855). It provided that every judgment founded on contract, expressed or implied, for the payment of money or property, which should be delayed by injunction, writ of error or appeal, with supersedeas, should, in the event of its affirmance, bear interest from its date. Even under this act McMurtry's judgment would have borne interest. It was founded on an implied contract, was for the payment of money, and was affirmed. By the act of 1837 (Lougborough, 280), it was provided that all judgments should carry interest from their date unless, etc., "provided that judgments in actions of malicious prosecutions, libel and slander, and actions of tort to the person, shall be excepted from the provisions of this act, and shall not bear accruing interest." This statute, broader than that of 1812, which embraced only judgments founded on contract which had been suspended by injunction, writ of error or appeal, included all judgments founded on contract, and also all judgments founded on torts, except those specified, viz., malicious prosecution, libel, slander and torts to the person. It applied to and embraced judgments founded on wrongs done to property. These excepted cases are such that the right

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of action does not and can not arise out of contract; they are wrongs done either to the person or character, not in violation of a contract obligation, of which the injury is a breach, but in violation of rights which exist independent of contract.

This act of 1837 appears as section 6, chapter 53 of the Revised Statutes: "A judgment, except for malicious prosecution, libel, slander, or injury to the person, and a decree, shall bear legal interest from its date." The same language, omitting "and a decree," is used in section 6, article 1, chapter 60, General Statutes. They mean the same. The revised form is more concise, and possibly for that reason less clear. But it manifestly means that a judgment rendered in any action, except in an action for malicious prosecution, etc., shall bear interest. "Injury" to the person means just what the act of 1837 meant by "torts" to the person. Both intended cases in which there was no contract liability for a judgment; when the right of action existed ex delicto, and not ex contractu, according to the former classification; cases in which the primary right affected was purely personal, existing independent of the will of the wrongdoer, and where the injury to that right was the direct and immediate cause of action; and none of them related to cases where the affected primary right was created by contract, existing by the will of him whose wrongdoing consisted in a failure to discharge a conventional duty. A physician, employed to minister as such to an invalid, undertakes, by legal attribution, to treat the sick person with skill and care. The patient not only submits himself willingly to do and suffer whatever the physician may prescribe; he procures the prescribed advice to be given, the act to be done. However grievously unskillful or careless the physician may be, his act is not a trespass vi et armis; it is not in invitum. The remedy of the injured man is on the implied contract of the physician that he will use skill and care; the act of unskillfulness or carelessness is the breach of that contract; the injury inflicted is the measure of damages. It is not in theory an action to recover damages for the direct injury to the person, but for the violation of a contract to administer medicine with skill and care.

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If McMurtry had, while crossing the track, been injured by the careless conduct of the trainmen; or if, being on the car by stealth, not having paid and not intending to pay, he had been injured, as he was injured, his cause of action, if he had any, would have had no contract basis and a judgment recovered would not have carried interest.

The judgment is reversed and the cause remanded, with directions to set aside the judgment and dismiss the plaintiff's petition.

L. M. Martin for appellant.

O'Hara & Bryan for appellee.

RECENT LEGAL LITERATURE.

Questions submitted to classes in Law School of Cincinnati from 1879 to 1884. Will H. Scott, Cincinnati, 48 pp. Price 50 cents.

A Treatise on the Statute of Frauds and other like enactments in the United States and British empire. By Henry Reed, of the Philadelphia Bar. Three volumes—volume III, 554 pp. Kay & Bro., Philadelphia, 1884.

We have already noticed in these pages volumes 1 and 2 of this treatise; the volume now before us completes the work. It contains the table of cases, index, and a valuable appendix showing the Statute of Frauds of the different States and England.

Speeches, Arguments and Miscellaneous Papers of David Dudley Field. Edited by A. P. Sprague. Two volumes. D. Appleton & Co., New York, 1884.

Mr. Field is well known. These volumes contain speeches and writings of his on a great variety of subjects—on political questions—legal reforms—constitutional arguments—codification. Everything in them is readable and much very thoughtful. They run through forty years and give a good idea of the growth of opinion in politics and law during that period.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Appeals—

1. Failure to file transcript in time—Dismissal—Where a transcript is filed after the expiration of the time prescribed by section 738 of the Code the appellee can not be regarded as in court, and the court will, of its own motion, dismiss the appeal unless the appellee has entered his appearance. Wade v. Board of Trustees of Elizabethtown., September 15, 1884. Opin. by Bowden, J., Sup. Ct., dis. Montgomery & Marriott for appellant.
2. Petition for rehearing—The filing of a petition for rehearing in the clerk's office during vacation has no effect whatever unless done by a written order of one of the judges, as provided by section 760 of the Code, and where the petition is filed with the clerk without such an order the court has no power at the succeeding term to allow it to be filed, or to be noted of record as if filed by the court within the prescribed time. Robertson v. Givens, Jones & Co. Sept. 12, 1884. Opin. by Bowden, J., Sup. Ct., overruling motion by appellant. C. T. Atkinson for appellant; Chas. H. Rodes and W. W. Thum for appellees.

Assignment of Errors. See Statutes.

Assignment for Benefit of Creditors—

1. Acceptance of deed of trust—Although the acceptance by the assignee of a deed of trust for the benefit of creditors is not binding upon the creditors, it must be presumed that they have accepted the deed also until they or some of them take proper steps to avoid it. Scott v. Baldwin & Co. Sept. 3, 1884. Opin. by Ward, P. J., Sup. Ct., aff. Haycraft & Slack for appellant; G. W. Ray for appellees.

Attachments—

1. Pleading—To authorize an attachment the provisions of the statute must be strictly complied with. The failure of the plaintiff to allege that his claim is "just" is sufficient to authorize the discharge of his attachment, and this is true even though the demand be not controverted by the defendant's answer. Green, Doll & Co. v. Baker, &c. September 19, 1884. Opin. by Richards, J., Sup. Ct., aff. C. C. Campbell and Isaac A. Stewart for appellants.

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Banks—

1. Liability to depositors—A bank, having received money on deposit, can not escape responsibility to the depositor by showing a verbal request by the depositor of the cashier to make investments for him. The books of the bank showing the deposits and the investment, the court will assume that the transaction was with the bank, and not with the cashier as the special agent of the depositor, and will require the bank to account either for the deposits or the investments. Robb v. Savings Bank of Louisville. September 25, 1884. Opin. by Pryor, J., Ct. Ap., rev. W. Lindsay and Harrison & McGrain for appellant; James Speed, Barnett & Noble and Thomas & John Speed for appellee.

Bills and Notes—

1. Forged indorsement—The drawer of a negotiable instrument may compel the holder, when he demands payment, to show the genuineness of the signature of all the prior parties to the paper. Therefore, in this action by appellant upon a bill of exchange, the drawer had the right to plead that the signature of one of the indorsers was not genuine and to call upon the plaintiff to prove it. Chaney v. City Bank. September 19, 1884. Opin. by Ward, P. J., Sup. Ct., aff. Campbell & Gaither for appellant; Petree & Littell for appellee.

Bill of Exceptions—

1. Time—There is no authority for the filing of a bill of exceptions prior to the rendition of judgment, and a bill so filed is stricken from the record in this case. Kemper Brothers v. Abbott, Morehead & Co., &c. September 15, 1884. Opin. by Richards, J., Sup. Ct., striking bill of exceptions from record. O'Hara & Bryan for appellants; W. K. Carlisle for appellees.

County Levy—

1. Validity of bond—A county levy bond must be executed either at or subsequent to the term during which the levy is imposed, and if executed prior to that term it can not be enforced either as a statutory or common law obligation.
2. Remedy of creditor against sheriff—When a county creditor proceeds by notice and motion under the statute to recover a judgment against the sheriff and his sureties for failing to pay him his claim out of the county levy, the notice must contain all the averments that would be requisite in a petition upon the bond. Therefore, when the creditor bases his demand upon orders of allowance made subsequent to the term at which the levy was ordered, he must both allege and prove that there is in the hands of the officer a sufficient sum to pay him, after deducting the claims previously allowed. Dicus v. English. September 11, 1884. Opin. by Richards, J., Sup. Ct., aff. Bigger & Reid for appellant; Gilbert & Reid for appellee.

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Deed—

1. Reforming—The grantor in a deed to a tract of land described as "containing 100 acres, more or less," when the deed in fact embraced 341 acres, is entitled to have the deed reformed, it appearing that both vendor and vendee supposed it embraced only about 100 acres. Counts v. Kitchen. September 9, 1884 Opin. by Holt, J., Ct. Ap., rev. Wm. Bowling and E. F. Dulin for appellant; J. R. Botts for appellee.

Depositions—See Divorce, 4—

1. Residence of witness—The residence of a witness in the county where the action is pending can not be urged as an objection to the reading of his deposition.
2. Exceptions—An exception to a deposition that questions the competency of the witness for all purposes was properly overruled, a part of the deposition being competent. Priest v. Taylor's Adm'r. September 3, 1884. Opin. by Richards, J., Sup. Ct., aff. Jeff. C. Johnson for appellant.

Descent and Distribution—

1. Advancements—Where land descends directly to the grandchildren of the intestate, the parent who would have inherited being dead, it is not chargeable with the debts due the intestate by the parent unless they may be regarded as advancements to be adjusted in an action for that purpose. Wells v. Wells, &c. September 15, 1884. Opin. by Bowden, J., Sup. Ct., aff. W. W. Kimbrough for appellant; A. Duvall for appellees.

Devise—

1. Defeasible fee—A devise to A "and the natural heirs of her body," with the provision that "if she dies without said heirs her portion of my estate shall return to my estate, to be divided between my other heirs," creates in A a defeasible fee.
2. Where a valuation is placed by a testator upon land devised the valuation goes as an incident to the devise. Ecton, &c. v. Smith, &c. September 27, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. W. M. Beckner and W. Lindsay for appellants; Breckinridge & Shelby for appellees.

Divorce—

1. Maintenance—Where the wife sues for a divorce on the ground of cruelty she is entitled to maintenance pendente lite, though she may have been already divorced from a former husband on the same ground.
2. The wife's right to maintenance pending her action for divorce is to some extent a local question, and there is a peculiar propriety in assuming that the chancellor has done his duty, and allowed her enough and no more. Hill v. Hill. September 10, 1884. Response by Bowden, J., Sup. Ct., to pet. for reh'g. Anton Kutzleb for appellant; W. R. Abbott for appellee.
3. Where a husband and wife boarded at a hotel and he ordered her to pack her trunks and leave, stating to her that he would not pay her board any longer, and thereupon she procured from the hotel manager another

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room and occupied it one night, and the next day had her trunk taken from her husband's room.

Held—This was no such abandonment by her as would entitle him to a divorce on that ground.

4. Depositions—Though the evidence shows the required residence of the parties, it is not sufficient unless the officer taking the depositions certifies that the witness by whom the residence is proved is known to him to be worthy of belief. Kean v. Kean. September 17, 1884. Opin. by Bowden, J., Sup. Ct., aff. Barnett, Noble & Barnett for appellant; W. Lindsay for appellee.

Evidence. See Pleading and Practice in Crim. Cases, 2.

Equity. See Husb. and W., 1.

Gaming—

1. Suffering gaming—Accomplice—A conviction of the offense of permitting gaming on one's premises may be had upon the testimony alone of one who was permitted to game, as such person is not an accomplice in the offense charged unless he had an interest in or control over the premises. Green v. Commonwealth. September 19, 1884. Opin. by Ward, P. J., Sup. Ct., aff. C. W. Lester for appellant.

Homestead. See Husband and Wife.

Husband and Wife—

1. Money treated as realty—Where money is directed to be converted into land, or vice versa, the property is to be considered in equity of the character it would have after the conversion, but a direction to have such effect must be given in a legal way, as by will or deed or judgment of a court. The mere naked intention of a party verbally expressed is not sufficient unless in case of a noncupative will.

Where the land of the wife, in which she was entitled to a homestead, was decreed to be sold to satisfy a mortgage lien upon it, with direction that a sale bond be taken payable to the wife for any excess of sale money above the mortgage debt, and both husband and wife died before the maturity of the bond, the wife dying first, the personal representative of the husband became entitled to the proceeds of the bond after paying debts, etc., as a part of the wife's personal estate, although the wife, just before her death, requested a gentleman to administer on her estate and reinvest the fund in a home for her infant children, who now claim the right to have it so invested. Smith's Adm'x v. Smith's Adm'r. September 27, 1884. Opin. by Holt, J., Ct. Ap., aff W. C. Ireland for appellant; John W. Hampton and L. T. Moore for appellee.

Infants' Real Estate, Sale of—

1. Authority is given courts of equity by both the General Statutes and section 490 of the Civil Code to sell real property owned by two or more persons, even if they be infants, which can not be divided without ma-

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terially imparing its value, upon the allegation and proof that the interest of the infant requires such sale, without a specific reference to the maintenance or education of the infant, or the investment of the proceeds of the sale in other property.

2. Process—When infants sue by their guardian, under section 490 of the Code, for the purpose of obtaining a judgment for the sale of real estate, it is not necessary that the infants should be made defendants to the action and served with process.
3. Curing defect—Where an amended petition was filed in such an action asking for the sale of a small parcel of property omitted to be mentioned in the original petition, it was not necessary that process on the amendment should be served upon infant defendants, but had it been necessary the answer filed by the infants by their guardian would have been sufficient to cure the defect. Bacon v. Bills, &c. September 6, 1884. Opin. by Lewis, J., Ct. Ap., aff. Byron Bacon for appellant; Randolph H. Blain for appellees.

Instructions—See Pleading and Practice in Crim. Cases, 4.

Judgments—

1. Process on amended petition—The court, having rendered by default a personal judgment and a judgment enforcing a lien upon land, had no power upon a return of "no property" as to a part of the original judgment, to render a judgment subjecting other inerests in the same land, this new cause of action being set out in an amended petition, upon which there was no service of process. Such a judgment was void, and the court erred in refusing to set it aside. Dameron v. Osenton. September 27, 1884. Opin. by Pryor, J., Ct. Ap., rev. R. D. Davis and James Botts for appellant; E. B. Wilhoit for appellee.

Jurisdiction—

1. Settlement of estate—The court can not grant relief which would involve the re-settlement of an estate in a county different from that in which the personal representative qualified. Ecton, &c. v. Smith, &c. September 27, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. Wm. Lindsay and W. M. Beckner for appellants; Breckinridge & Shelby for appellees.

Lien—

1. The statement in the note that the piano was to remain the property of the payee until the note should be paid gave a lien upon the piano, although the note was a renewal of the original note executed for the purchase price in which there was no such recital. Scott v. Baldwin & Co. September 3, 1884. Opin. by Ward, P. J., Sup. Ct., aff. Haycraft & Slack for appellant; G. W. Ray for appellees.

Limitation—

1. Action against seller of spurious bond—A cause of action accrues in favor of the purchaser against the seller of a spurious bond immediately upon its transfer, and is barred after five years from that date. The

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purchaser is not obliged to postpone suit until it has been determined by a court of competent jurisdiction that the bond is spurious.

2. Principal and agent—Where one has traded with an agent for an undisclosed principal, the fact that the agency was not disclosed at the time does not prolong the time within which suit may be brought against the principal, unless the plaintiffs' efforts to find out who was the principal were obstructed by the principal's conduct. Covington v. Morton, &c. Same v. Nortin. September, 1884. Opin. by Ward, P. J., Sup. Ct., aff. A. M. Rutledge, J. S. Ray and R. W. Covington for appellant; A. P. Humphrey, W. O. & J. L. Dodd and Goodloe & Roberts for appellees.

3. Fraud and mistake—While in cases of fraud or mistake the statute begins to run only from the discovery of the fraud or mistake, in no case does an action lie after ten years from the making of the contract or the perpetration of the fraud.

The action by a vendee to recover for the deficiency in the tract of land fraudulently represented by the vendor to contain a greater number of acres than it actually contained is barred, more than ten years having elapsed after the sale and execution of title bond before the bringing of the action. Lyms v. Henderson. September 27, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. Thomas & Pugh for appellant; Geo. T. Halbert for appellee.

Liquor Dealer—

1. Right of distiller to sell spirits at his residence - Under the statute which permits a distiller to sell at his residence spirits of his own manufacture, he is not permitted to sell at his store room, although it and his dwelling house are in the same enclosure. Moody v. Commonwealth. September 17, 1884. Opin. by Richards, J., Sup Ct., aff. Bronston & Caperton for appellant.

Married Women—

1. Garnishee—Where a married woman, authorized to trade as a feme sole, is a garnishee, there is no reason why an ordinary execution may not issue against her upon her failure to comply with a rule requiring her to pay into court the money owing to the defendant. Cavanaugh v. Fried. September 11, 1884. Opin. by Fryor, J., Ct. Ap., aff. O. D. McManama for appellant; D. M. Rodman for appellee.

Negligence—

1. *Pleading*—In an action by an employe against his employer to recover for an injury resulting from defects in machinery furnished by the employer, the petition should not only allege that the machinery was defective, but that the defects were known or could, by the exercise of ordinary care, have been made known to the employe.

2. Instruction—It was not for the court to tell the jury what facts in the case constituted contributory negligence. It is for the jury to determine in each case what acts amounted to negligence, and whether they contributed to the injury, so that it would not have happened but for those acts.

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3. The court properly refused to instruct the jury that the plaintiff, as brakeman on defendant's train, undertook to run all the "risks, damages and hazards" incident to his employment as such brakeman. The word "ordinary" should have been inserted before the word 'risks." C. O. & S. W. R. R. Co. v. Bell. September 15, 1884. Opin. by Ward, P. J., Sup. Ct., rev. Holmes Cummins and Quigly & Quigly for appellant.

New Trial—

1. Surprise—The fact that a witness testified differently from what he had done on a former trial, and that this was a surprise to appellants that could not have been guarded against, did not authorize the granting of a new trial. Appellants, instead of asking a postponement of the trial, took the chance of a verdict, and must, therefore, abide it.
2. A motion for a new trial upon the ground of surprise is addressed to the sound discretion of the court, and the ruling below should not be disturbed unless it was clearly erroneous. Ivers v. Avery & Sons. September 13, 1884. Opin. by Holt, J., Ct. Ap., aff. Isaac H. Trabue and S. F. Trabue, jr., for appellant; W. O. Dodd for appellees.
3. The newly-discovered testimony that will authorize a new trial must be of such clear and convincing character that it will doubtless change the result of the former trial, and such that the party could not with reasonable diligence have discovered and produced at the trial. Bramel v. Clark. September 11, 1884. Opin. by Holt, J., Ct. Ap., aff. A. Duvall, B. G. Willis and O. Deming for appellant.

Officers—

1. Liability of judicial officers—The general rule applicable to all judicial officers is that when the officer has jurisdiction of the person and of the subject-matter he is exempt from suit by a private individual for damages so long as he acts within his jurisdiction and in a judicial capacity.
2. Pleading—An allegation that a defendant maliciously "advised, persuaded and procured" a judge to render a certain judgment against the plaintiff is not sufficient to constitute a cause of action against the defendant. Tabb v. Mudd, &c. September 25, 1884. Opin. by Lewis, J., Ct. Ap., aff. Wilson & Hobson for appellant; Montgomery & Poston for appellees.

Partnership—See Pleading 4.

1. Levy on partnership property—Where partnership property is levied upon to satisfy an individual debt of one of the partners the levy holds what remains after paying all firm debts and adjusting the partnership accounts.
2. Sale—A levy on a partner's interest in partnership property does not vest the title in the officer. The firm may sell subject to the lien, and after that is removed the purchaser holds the property free from any claim of the firm or its creditors. Graves v. McKinney's Adm'r. September 22, 1884. Opin. by Bowden, J., Sup. Ct., granting rehearing, aff. on original and reversed on cross appeal. L. Hathaway and Geo. B. Nelson for appellant; Haggard & Jones for appellee.

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Pleading—

1. Insufficient denial—A denial that the defendant is indebted to the plaintiff in the amount claimed in the petition is insufficient.
2. Counterclaim—A counterclaim must be pleaded with the precision required in a petition. An allegation that the plaintiffs sold and delivered to the defendant a certain quantity of tobacco, representing that it was in good condition when it was not in good condition, and was not worth the price for which they sold it, there being no allegation of resulting loss, and no allegation that the representation of the seller was an inducement to the contract, is not sufficient to constitute a counterclaim. Green v. Dudley, &c. September 8, 1884. Opin. by Bowden, J., Sup Ct., aff. R. D. Handy for appellant; Benton & Benton for appellees.
3. There can be no recovery upon a contract to pay money without an allegation of a breach thereof.
4. One partner can not sue alone and for his sole benefit upon a contract executed to the partnership, and when he attempts to do so there is not a mere defect of parties that can be waived by a failure to demur. Mattingly v. Spalding. September, 1884. Opin. by Richards, J., Sup. Ct., rev. J. P. Thompson for appellant; H. P. Cooper for appellee.
5. Actions for recovery of personal property—In actions for the delivery of personal property or its value it is sufficient to allege that the plaintiff is the owner, and entitled to the possession, of certain property particularly described of a named value, which is in the possession of the defendant, and by him wrongfully detained. If more than one article is claimed the petition should state the value of each, but a defect in this respect can not be reached by a demurrer to the petition. Priest v. Taylor's Adm'r. September 3, 1884. Opin. by Richards, J., Sup. Ct., aff. Jeff. C. Johnson for appellant.

Pleading and Practice in Crim. Cases—

1. Indictment charging more than one offense—Pending a demurrer to an indictment because it improperly charges more than one offense, the Commonwealth may dismiss all but one charge, and thereupon the demurrer shall not be sustained on that ground. Crim. Code, section 168. If the court improperly overrules the demurrer, there being no offer to dismiss, yet requires the prosecution to elect one of the charges, which is done, the error in overruling the demurrer is not prejudicial to the substantial rights of the defendant, and is no ground for reversal.
2. Evidence—The evidence being that the liquor sold was in a bottle marked "Hostetter's Bitters" and "Patent Medicine," it was competent to prove that the contents were "intoxicating," "tasted like whisky," and that it made those drunk who drank it. Parrott v. Commonwealth. September 19, 1884. Opin. by Bowden, J., Sup. Ct., aff. J. H. Tinsley for appellant.
3. Indictment for rape—It is not necessary that the accusatory part of an indictment for "rape" should state whether the rape was upon the body

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of a female under or over twelve years of age. "Rape" is a sufficient designation of the offense charged.

4. Instruction as to reasonable doubt—The jury should have been told that if the guilt of the defendant was not proved beyond a reasonable doubt he was entitled to an acquittal, and the failure to give such an instruction is a reversible error. Poston v. Commonwealth. September 4, 1884. Opin. by Holt, J., Ct. Ap., rev. G. W. Adair for appellant; P. W. Hardin for appellee.
5. Weight of evidence for jury—Where there is any evidence tending to establish guilt in criminal cases the appellate court has no power to review and set aside a verdict of guilty returned by the jury, the credibility of the witnesses and the weight to be given to their evidence being exclusive for the jury. Spencer v. Commonwealth. September 23, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. Winfrey & Winfrey for appellant; P. W. Hardin for appellee.

Practice in Civil Cases—

1. Rule to file exhibit—Upon the trial of a rule against a party to file a writing upon which his action is found the sole question to be determined is, can the party produce the writing? and, if not, has a sufficient reason been given for its nonproduction?

   In this action by appellant upon a policy of life insurance it appeared from her response to a rule against her to file the policy, and from the undenied allegations of her petition, that the policy was in the possession of one residing in another State, to whom the insured had pledged it in his lifetime, and that the plaintiff had been unable to obtain it, although she had endeavored so to do, the party having possession of the policy being before the court only by warning order.

   Held—That the rule against the plaintiff should have been discharged. Bacon's Adm'x v. Mutual Benefit Life Ins. Co. September 6, 1884. Opin. by Holt, J., Ct. Ap., rev. Polk & Gaglay for appellant; Isaac Caldwell for appellee.
2. Transfer to equity—Trial of legal issues by jury—Waiver—It being essential that an ordinary action should go to equity that it might be heard with a pending equitable action, the defendant by consenting to the transfer did not waive his right to a jury trial, but was entitled to have the legal issue submitted to a jury, the exercise of equity jurisdiction being dependent upon the result of the legal issue; and the Campbell Chancery Court being authorized by a special enactment to have juries empanneled when necessary to try issues of fact, it was not necessary to remand the case to the circuit court. Betz v. Newport Provision Mart. Association. September 6, 1884. Opin. by Pryor, J., Ct. Ap., rev. J. R. Hallam, John S. Ducker and W. Lindsay for appellant; Simmons & Schmidt for appellee.
3. When the whole record shows that an issue of fact was regarded by the parties as presented by the pleadings; that evidence relating to that issue was introduced, and that the issue was actually tried, a judgment

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will not be reversed merely that the issue, once fairly tried, may be more clearly stated in the pleadings. Boales v. Boulware. September 10, 1884. Resp. by Bowden, J., Sup. Ct., to pet. for reh'g by appellant; Richards, J., dissenting. Feland & Sebree and A. Duvall for appellant; H. A. Phelps & Son for appellee.

Railroads—

1. Trespassers on track—A railroad company is under no obligation to provide a safe and properly constructed locomotive for the protection of those who are trespassers on its track. Therefore, appellant is not entitled to recover of appellee for an injury received from defective machinery forming a part of one of appellee's locomotives, as he was without right using appellee's track as a passway, and at the time he was injured was standing near the track, on appellee's right of way, having stepped aside to avoid the passing train.
2. Evidence—The declarations of the fireman at the time of the injury as to the existence of facts tending to show the company's knowledge of the defects in the machinery of the locomotive were not admissible, the fireman not being that character of agent whose declarations are admissible upon the ground that he is speaking for the corporation. Lyter v. L.,C. & L. R. R. Co. September 11, 1884. Opin. by Pryor, J., Ct. Ap., aff. Carroll & Barbour and W. P. Thorn for appellant; W. Lindsay for appellee.

Rape—See Pleadings 4 and Pleadings in Crim. Cases, 3.

Rent—

1. Death of life tenant—The rent which section 29, article 2, chapter 39, General Statutes, provides shall be paid by the lessee of a life tenant of land, who has let the land for the year and dies after the first day of March, is a reasonable rent and not that fixed by the contract, nor is it payable for the entire term fixed by the contract, but only until the last day of December following the death.
2. Attachment for rent—The affidavit for an attachment for rent must be made before the officer who issues the attachment. Norris v. Cheatham, Gd'n, &c. September 12, 1884. Opin. by Ward, P. J., Sup. Ct., rev. Thos. E. Ward for appellant; M. Merritt and A. T. Dudley for appellees.

Statutes, Construction of—

1. Repeal—When a statute is amended the amendment becomes a part of the original enactment, and an act repealing the statute repeals the amendment.
2. The act of April 4, 1884, which repeals so much of chs. 1 2 and 3 of title 18 of the Civil Code "as relates to and requires the assignment of errors and cross-errors by parties prosecuting appeals or cross appeals," repealed the act of May 5, 1880, amendatory of section 756 of the Code, which is a part of chapter 3, title 18. Dicus v. English. September 11, 1884. Opin. by Richards, J., Sup. Ct. aff. Bigger & Reid for appellant; Gilbert & Reid for appellee.

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Sureties—

1. A surety who has not paid the debt for which he is liable is not entitled to a judgment against his principal therefor. The limit of his right is to require the principal to pay to the creditor. Graves v. McKinney's Adm'r. September 22, 1884. Opin. by Bowden, J., Sup. Ct., granting reh'g; aff. on original appeal and rev. on cross appeal. L. Hathaway and Geo. B. Nelson for appellant; Haggard & Jones for appellee.
2. Where the obligee in a valid note was induced by fraud to accept in lieu thereof notes which were forgeries as to the surety in the original note, but binding on the principal, the collection of a part of the debt on the forged notes did not release the surety on the note binding on all, the amount collected having been credited on that note. McMeekin v. Stratton. September 11, 1884. Opin. by Pryor, J., Ct. Ap., aff. L. Hathaway and Geo. B. Nelson for appellant; Haggard & Jones for appellee.

Tax Sale—

1. Lien of municipal corporation—The statute which provides that the purchaser at a sale for State taxes shall acquire all the title which the person to whom the property was assessed had therein at the date of the assessment, and "free from all liens or claims of any person claiming under or through him," is enforceable against municipal corporations, and the lien of the municipality for taxes is lost when the whole estate has been sold to pay the taxes due the State. Moreover, in this case the city or its authorized agents knew the property was about to be sold for taxes due the State, and should have taken such steps as would have secured the city, either by purchasing the property or relieving it from the burden, by paying the taxes due the State. City of Paducah v. Green. September 11, 1884. Opin. by Pryor, J., Ct. Ap., aff. P. D. Yeiser for appellant; W. D. Green for appellee.

Title—

1. Removal of cloud upon—In order to give jurisdiction to remove a cloud upon title it must appear that the deed or other instrument constituting the cloud may be used to injuriously or vexatiously embarass and affect the title of the complainant. It must be a case where extrinsic evidence would be required to show the falsity of the claim, and not merely a case for construction and interpretation. Therefore, where both parties are claiming under the same instrument, and the question presented is purely one of construction, no case is presented for the removal of a cloud upon title. Ecton, &c. v. Smith, &c. September 27, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. W. M. Beckner and W. Lindsay for appellants; Breckinridge & Shelby for appellees.

Towns and Cities—

1. Liability for injuries by dogs—The mere fact that appellee, in consideration of the payment of a tax or license fee by the owner of a vicious dog, licensed him to keep the dog within the city limits, does not render

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the appellee liable for injury done to appellant by the dog upon a public thoroughfare of the city. In the absence of the license it can not be inferred that the city undertook to exempt the owner and assume herself all the liability for injury that might be done to persons and property by the dog. Lewis v. City of Louisville. September 4, 1884. Opin. by Lewis, J., Ct. Ap., aff. I. H. Trabue for appellant; T. L. Burnett for appellee.

Trusts—

R. conveyed a tract of land to J. in trust, with power to J. "to sell, convey, or otherwise dispose of said property when he should think proper to do so," by and with the consent of R., or, if he should not be living, by and with the consent of the beneficiaries. The trustee sold and conveyed the land with the consent of R., taking the notes for the purchase price, payable to himself, and with the further consent of R. assigned one of the trust notes to appellant in payment of a note in which he, the trustee, was principal and R. was surety.

Held—That the trustee did not have the right to appropriate the trust fund to his own personal use, either with or without R.'s consent; nor can there be any value in the consent of R. to the application of the trust fund to the payment of a debt for which he was himself personally liable, the trustee being insolvent. Boales v. Boulware. September 10, 1884. Resp. by Bowden, J., Sup. Ct., to pet. for reh'g by appellant. Feland & Sebree and A. Duvall for appellant; H. A. Phelps & Son for appellee.

Vendor and Vendee—

1. Action to enforce lien—Burden of proof—In this action to enforce a vendor's lien for purchase money, the defense being that the vendor fraudulently misrepresented the number of acres in the track of land, the burden of proof as to the fraudulent representations was upon the defendant, and as he exhibited no proof whatever the court should have entered judgment enforcing the lien, the land being sufficiently described in the petition by metes and bounds, and the identity of the land being admitted by the answer. Rosen, Adm'r v. Holland. September 27, 1884. Opin. by Hines, Ch. J., Ct. Ap., rev. Rollen Hurt for appellant.

Water Courses—

1. The use of a stream as the carrier of surface water is natural, and all riparian owners have this right in common. As the increased velocity of the stream is the inevitable result of the exercise of this right the riparian owner is not liable for damage resulting therefrom.
2. If upper owners turn so much water into the stream as to overflow its banks and thus flood lands below the lower owner may justly complain; but if, in derogation of the right of the upper owner to drain into the stream in such quantity as not to exceed its capacity, the lower owner erects a building below the level of the banks, he can not complain.

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8. A city charged with the duty of grading streets and maintaining healthful conditions must be regarded as having the rights of riparian owners whose interests with those of other citizens it conserves. Hicks & Carter v. City of Owensboro. September 19, 1894. Opin. by Bowden, J., Sup. Ct., aff. W. N. Sweeney & Son for appellants; Stewart & Atchison and Jolly & Todd for appellee.

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COURT OF APPEALS OF KENTUCKY.

REDMON v. COMMONWEALTH.

(Filed October 2, 1883.)

1. Criminal law—New trials—Defendant, having been convicted, moved for a new trial on the ground that the jury had settled their verdict by lot. The trial court refused to grant a new trial, held, the decision of the trial court on motions for new trials is final and can not be reviewed under Criminal Code, section 281, on appeal.

2. Paducah, &c., R. R. Co. v. Comomnwealth, 3 Ky. Law Reporter, 650, overruled.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Hines.

From a conviction and sentence to the penitentiary for nine years on the charge of murder this appeal is taken.

The principal ground relied upon for reversal is that the verdict of the jury was arrived at by lot. It appears that there was no difference of opinion among the jury as to the guilt of appellant and no individual opinion expressed as to the character of punishment that should be inflicted, when it was agreed that each juror should write upon a slip of paper the length of time he thought the accused should be confined in the penitentiary, and that these sums, when added together and divided by twelve, should be the verdict they would return. The result was nine years and some months, but by common

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consent the months were dropped and a verdict for nine years, as the result of the agreement, was returned.

Jurors were examined under authority of section 272 of the Criminal Code to establish the fact that the verdict was arrived at by lot, and the question presented for the consideration of the trial court for the first time on the motion for a new trial.

Section 280 provides that either party may except to any decision of the court by which the substantial rights of the party are prejudiced, but section 281 provides that: "The decision of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception." Section 282 provides that the exceptions shall be shown upon the record by a bill of exceptions, prepared as in civil cases. Section 340, as amended, reads: "A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby."

From these provisions of the Code the jurisdiction of this court to try and determine felony cases is derived. The Constitution confers no jurisdiction upon this court in such cases, but authorizes the legislature to grant such jurisdiction as it may think proper. We have no more right to depart from or to enlarge the limits of the jurisdiction as prescribed by statute than we would have to assume jurisdiction in case the legislature had seen fit not to confer any appellate jurisdiction (Rutherford v. Commonwealth, 78 Ky., 639). The Code as quoted provides that we may consider and reverse in criminal cases where the error appears on the record by bill of exceptions presented in the manner prescribed, and also provides that the error here complained of (overruling a motion for new trial) shall not be subject to exception. We can no more consider an alleged error so presented than we could a case in which there was no bill of exceptions, for in fact a bill of exceptions not authorized is no bill. We have nothing to do with the policy or impolicy of conferring jurisdiction in criminal cases upon this court, whether limited or unlimited.

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That belongs to the legislative department. Errors such as that complained of here were left to the discretion of the lower or trial court where the whole jurisdiction might have been left if the legislature should have thought proper.

This construction was placed by this court upon the Code as early as the 16th of October, 1878 (Kennedy v. Commonwealth, 14 Bush, 340), and was uniformly followed until the case of Paducah and Elizabethtown R. R. Co. v. Commonwealth, 80 Ky., 3 Ky Law Rep., 650, decided March 9, 1882. The opinion in that case does not discuss the question of the construction of the Code and the jurisdiction of this court, but decides a question similar to the one presented here, and adversely to a long line of opinions and contrary to the views herein expressed. That case is overruled.

The other question presented if presenting technical error, the error does not appear to have been prejudicial to the substantial rights of the accused, and, therefore, not a cause for reversal.

Judgment affirmed.

Offutt & Ford and W. H. Wadsworth for appellant.

P. W. Hardin for appellee.

LISLE v. COMMONWEALTH.

(Filed October 7, 1884.)

1. Indictment—Distinct offenses—A and B were indicted for conspiring to rob and robbing C of a silver dollar and a warrant of arrest, Held—The indictment was good and did not charge distinct offenses.

2. Evidence — Co-conspirators — One defendant was incompetent, under Criminal Code, section 234, to testify for the other.

3. Continuance—One continuance having been granted defendant on account of the absence of a material witness, he was not entitled to further delay unless it appeared that he could obtain the absent witness thereby.

Appeal from Green Circuit Court.

Opinion of the court by Chief Justice Hines.

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This appeal is from a conviction and sentence of appellant, Lincoln Lisle, to the penitentiary on an indictment against appellant and John Lisle, charging them with conspiring to commit and committing a robbery. John Lisle appears to be the father of Lincoln Lisle. John Lisle was not arrested. Appellant moved to continue the cause on account of the absence of his father, John Lisle, by whom it was alleged that facts material to the defense of appellant could be proved. The court postponed the trial several days on this application for continuance, and the officer charged with the subpœna and the warrant of arrest having failed to find the witness, John Lisle, the case went to trial with the result stated. The first question made is whether appellant was entitled to a continuance on this application. We think not for two reasons; First, there appeared no reasonable grounds to believe that by longer delay the witness could be obtained; and, second, appellant and the witness being joined in the indictment on the charge of conspiracy to commit the offense of which appellant was convicted, the witness, John Lisle, would not have been competent to testify on behalf of his co-conspirator. (Section 234, Criminal Code.)

The next and only remaining question presented that need be considered is whether the indictment does not embrace two offenses not authorized by the Criminal Code or by the statute. The indictment charges the taking, at the same time and by the same act, one silver dollar and a warrant of arrest issued against the accused, and properly in the hands of the person robbed, for execution as an officer.

It is contended that the taking of the instrument, denominated a warrant of arrest or a peace warrant, being expressly provided for by statute, constitutes a different offense from robbery, and, therefore, not to be joined under the statute or Code. The section of the statute upon which this objection is based is found in the 11 article of chapter 29 of General Statutes, and reads: "If any person shall steal, fraudulently destroy, or withdraw the record, or any part thereof, of any

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judicial proceeding, pending or decided, he shall be confined in the penitentiary not less than two nor more than ten years."

This statute does not necessarily embrace or involve the element of force in the taking, but by the expression "steal," "fraudulently destroy," "or withdraw," implies the absence of force or putting in fear, which are the essential elements of robbery. Therefore, the charge of robbery in the indictment, when the taking of the one dollar was by force and putting in fear, does not embrace the statutory offense in reference to records, nor does the statement as to the warrant constitute any offense under the statute, and, if it did, the indictment would not be subject to the objection that it charged two separate offenses. But as robbery may be perpetrated by the forceable taking of anything of value an allegation of value in the warrant would make the indictment good without reference to the taking of anything else.

In any event the indictment was good. The acts charging the offense of robbery of the money and warrant were one and done at the same time, constituting but one offense, though it charged the taking of several articles of different value and for which different penalties may have been prescribed.

"Different offenses" carries with the expression the idea of separate, distinct and independent action in the perpetration of each.

Judgment affirmed.

Jeff. Henry for appellant.

P. W. Hardin for appellee.

ROONEY v. LIEVNY.

(Filed October 9, 1884.)

1. Pleading—Inconsistent defenses—In an action for slander defendant can't deny and also plead the truth in justification.

Appeal from Hancock Circuit Court.

Opinion of the court by Chief Justice Hines.

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This is an action of slander in which judgment was rendered for appellee, who was defendant in the court below.

The only question we will consider is whether the court below erred in allowing appellee to plead inconsistent defenses. The first paragraph of the answer denies the speaking of the words set forth in the petition, and in the second paragraph, by amendment, it is alleged as follows: "The defendant amends the second paragraph in his answer and says that, for the purpose of this action and the perfection of his plea in said paragraph contained, he admits the speaking of the words in the petition alleged to have been spoken by him." The second paragraph thus amended pleads in justification the truth of the words admitted to have been spoken. These defenses, the one admitting and the other denying the speaking of the words charged in the petition, the question presented is whether inconsistent defenses in actions for slander is permissible under the Code of 1877 and now in force.

In the Code of 1854, section 151, it is provided that in actions for libel or slander "the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances legally admissible in evidence to reduce the amount of damages; and whether he proves the justification or not he may give in evidence the mitigating circumstances." Section 124 of the Code of 1877 is in substance the same as that quoted from the Code of 1854. Under the latter Code, and construing section 151, this court held, in Harper v. Harper, 10 Bush, 447, that such inconsistent defenses as set up in this case could be pleaded and relied upon. But by the express letter of the Code of 1877 a different construction is placed upon those sections. Subsection 4 of section 113 of the present Code provides that "if a party file a pleading which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall upon or without motion be required to elect which of them shall be stricken from his pleading. But a party may allege alternately the existence of one or another

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fact, if he state that one of them is true, and that he does not know which of them is true."

The Code of 1854 contains no provision in regard to inconsistent statements in a pleading or inconsistent defenses.

The present Code provides that a party may plead as many defenses as he may have, provided, as in the provision quoted, they are not inconsistent.

The weight of authority under the Code practice is to the effect that inconsistent pleas may be made and relied upon when not forbidden by statute (Pomeroy on Remedies and Remedial Rights, section 722); but here the language of the Code expressly forbids such defenses where the statements necessary to their presentation are inconsistent the one with the other.

We are of the opinion that the statements contained in the first and second paragraphs of the answer, being inconsistent, come within the provisions of subsection 4 of section 113 of the Code.

This construction leaves section 124, which permits the defendant to admit the truth of the matter alleged in the petition and to plead mitigating circumstances in mitigation of damages, in full force.

Judgment reversed and cause remanded, with direction for further proceedings consistent with this opinion.

Stuart & Atchison and M. A. Mason for appellant.

Williams & Powers and Jno. Allen Murray for appellee.

LORAN v. WEBB.

(Filed October 4, 1884.)

1. County clerkship—Election where a vacancy in a county court clerkship so occurs that there is not time to give the eight days' notice before the regular election on the first Monday in August, a special election to fill the vacancy shall be ordered for a day within six weeks after such first Monday.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

W. E. Loran, the county clerk for the county of Jefferson, died on the 24th of July, 1881. His term of office would have

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expired in September, 1882. In a few days after his death the judge of the Jefferson County Court appointed John C. Loran to fill the vacancy until an election could be had, and until the person chosen should qualify. An election was held, as ordered by the county judge, on the 27th of August, 1881, and resulted in the election of the appellee, George Webb.

Loran, the appellant, by a proper proceeding is questioning Webb's right to the office because he was not chosen to fill the vacancy at the time provided by law, viz., "at the next succeeding August election."

The 7th section of article 6 of the State Constitution provides that "vacancies in office under this article shall be filled until the next regular election in such manner as the General Assembly may provide." Article 6 has reference to executive and ministerial offices for counties and districts, and embraces the office of county court clerk. Under this provision of the Constitution we find that the legislature has provided the manner in which such vacancies are to be filled. Section 4 of article 6 of chapter 33, General Statutes, provides that "no writ for the election of a county officer or representative or senator shall be issued, except so as to enable the sheriff to give such notice (notice of the election) at least eight days before the election." The 6th section of the same article provides that "the next succeeding first Monday in August shall always be the day appointed by writ or proclamation for holding an election, except as in this chapter allowed, unless to fill a vacancy in the Court of Appeals or in the office of circuit judge, or unless there is or will be an intervening session of the legislature or of congress, rendering it necessary to fill a vacancy therein before the first Monday in August."

The 7th section provides: "But when a vacancy so occurs that there is no time to give the requisite notice before the proper first Monday in August, a special election shall be ordered to take place on a day within six weeks after such first Monday."

The clerk dying on the 24th of July, 1881, there was no time between that period and the next succeeding first Monday in August to give the eight days' notice of the election, and for

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that reason the county judge was required to order an election to take place on a day within six weeks after such first Monday.

This was done and the election had on the 27th of August, and Webb, having been elected, was entitled to qualify. The 7th section of article 6 of chapter 37, in providing for the election on the next succeeding first Monday in August, excepts such elections as in that chapter are otherwise allowed. The language of the section is: "Except as in this chapter allowed." The 4th section having required a notice of eight days to be given, the framers of the statute saw that a vacancy might occur within eight days prior to the succeeding first Monday in August, and for that reason provided by the 7th section that when there was not time to give the requisite notice a special election shall be ordered to take place within six weeks after such first Monday. This was one of the exceptions to the mandatory part of section 6, requiring the election to be held on the next succeeding first Monday in August. The provision of the State Constitution found in article 6 of that instrument, authorizing vacancies in certain offices to be filled "until the next regular election in such manner as the General Assembly may provide," evidently means the next regular election for such offices to be held at or after the expiration of the term of office in which the vacancy has occurred.

The court below having so adjudged that judgment is now affirmed.

Barnett & Noble, Jackson & Phelps, John Stites and Alex. P. Humphrey for appellant.

Duff Reed and Edward Badger for appellee.

ROCHESTER, &c. v. SLEDGE, &c.

(Filed October 7, 1884.)

1. Road—Establishing for public—The report of viewers made upon an application to establish a public road held in this case sufficiently specific in setting out the metes and boundaries of the road and in stating the public conveniences to accrue therefrom.

Appeal from Allen Circuit Court.

Opinion of the court by Chief Justice Hines.

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This is an appeal from an order of the circuit court allowing an application to establish a public road, the application having been first made to the county court and rejected. These appeals are authorized by section 43, article 1, chapter 94, General Statutes.

The principal objection urged to the judgment of the circuit court establishing the road is that the report of the viewers is not sufficiently specific as to metes and bounds, courses and distances, the terminal point, and that they fail to report the conveniences and inconveniences to both the public and private persons over whose lands the road is proposed to be located.

The report of the viewers returned a diagram or plat of the proposed road and in reference to the land of appellant the report recites: "Beginning at a stone on the southwest side of the Bowling Green and Scottsville road, at the letter A, and ran S. 48½ W. 41 poles, across the land of W. H. Rochester, to a stake on the land of N. K. Singer," and recited that the establishment of the road would result in some inconvenience and damage to appellant Rochester, but that the damage would be more than compensated for by the advantages that the road would be to Rochester. The terminal point is designated as follows: "Thence with his (Johnson's line) and Pearson's line S. 34 W. 38 poles, S. 50 W. 14 poles, S. 63 W. 32 poles, S. 69½ W. 52 poles, S. 75 W. 18 poles, S. 87 W. 14 poles, S. 65½ W. 20 poles, S. 11 E. 8 poles to Tramel creek, about one mile."

The object of these provisions of the statute is to give the owner of the land over which the proposed road is to pass information of location in order that there may be an agreement, if there is damage, as to its amount, or that those acting under a writ of ad quod damnum may be able to locate the route and thereby determine the damages.

The cases cited by counsel were under the Revised and previous statutes, which are essentially different from the General Statutes under which this proceeding is had. The Revised Statutes, volume 2, article 1, section 3, chapter 84, provides that the report of the viewers should describe the route laid out "by metes and bounds, and by courses and distances,"

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while the General Statutes, article 1, section 3, chapter 94, is "by metes and bounds, and by general courses and probable distances." This alteration was evidently made in the language of the law in view of the strict construction placed upon the former statutes, and with a view of making a substantial compliance with the statute sufficient. Technical compliance with the old statute defeated its object, and, therefore, the alteration by the more catholic statute which protects the right of the citizen, without impairing the right of the public, to free and convenient communication in the discharge of public duties and for private conveniences.

The report of the viewers definitely locates the road as proposed to be run over the land of appellant, even under the old statute, and in accord with the decisions construing that statute. It locates the beginning at a certain point, and from that point gives the course and distance over the land of appellant. The terminal point of the road is also located with technical accuracy by a natural object, "Tramel creek," as it was suggested, in one of the opinions cited, was necessary under the old statute.

Judgment affirmed.

D. W. Wright and McElroy for appellants.

Porter & McQuown for appellees.

WORTHINGTON v. CITY OF COVINGTON.

(Filed October 14, 1884.)

1. Street improvements—Liability of lot owner—Where the city charter requires all contracts for street improvements to be referred to a committee of the city council, and such a contract was made without that reference, Held—The lot owner is not liable for the cost of the improvement, and the city may be enjoined form collecting for its cost.

2. The city council is sole judge of the necessity of improving a street, and its judgment and assessment thereon can not be reviewed unless that power has been expressly given (as in this case) to another tribunal.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Holt.

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This appeal involves the right of the appellee, the city of Covington, to compel the appellant, Henry Worthington, to pay an assessment for the improvement of one of its streets, abutting upon his property.

Having enjoined its collection, and his injunction having been dissolved in part by the court below, he now urges various reasons for the reversal of the judgment; but as one of them is in our opinion decisive of the matter, it is needless to notice the others.

It is, however, proper to remark that while the council or municipal legislature of a city can not exercise such an arbitrary and unlimited power as to amount to legislative spoliation, yet the necessity and propriety of improving a street is a matter in its discretion; and if an assessment is made by it for such a purpose it is final unless the power has expressly been given to some tribunal to review it; and upon the former hearing of this case the attention of the court was not called to the fact that by an act of the legislature of February 24, 1865, the power had been conferred upon the courts to correct, equalize and regulate assessments made by the council of the city of Covington upon property in that city for street improvements; and that, therefore, the lower court had properly exercised this power. (Acts of 1865, volume 1, page 412.)

Section 12 of an act to amend the charter of the city of Covington, approved March 9, 1868, reads thus: "Hereafter, before any contract shall be made by the council for any work to be done in the construction or improvement of any street or alley and other public improvement in the city of Covington, the proceedings of the council with reference thereto shall be referred to the committee on law, in conjunction with the city attorney, who shall examine said proceedings and shall ascertain and report to the council whether said proceedings are regular and in accordance with the provisions of the charter and amendments thereto, and whether the city will be liable for the cost of said construction or improvement." (Acts of 1867-8, volume 2, page 431.)

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In the case under consideration this was not done; and a contract made by a municipal corporation for the improvement of a street must be executed in conformity to the statute. It is the agent of the law and authority delegated to it must be strictly pursued.

The power to make the improvement and then compel the lot owner to pay for it while not entirely unlimited, is of an absolute character. It is liable to abuse, and may in some cases be oppressive.

It exists by virtue of the statute only, and not by the common law.

It can not be enlarged by implication; and the corporation can not compel payment to it by the property owner if it has proceeded in violation of or not in accordance with the law from which it alone derives its power. (Broadway Baptist Church, &c. v. McAtee, &c., 8 Bush, 508; Murphy v. City of Louisville, 9 Bush, 189.)

In the case of Woods v. The City of Covington (MS. opinion, June 25, 1881), 3 Ky Law Rep., 85, the contractor sued both the city and the lot owner for the contract price of a street improvement, and this court held that the city council had no power to make the contract without first referring their proceedings to its law committee; and that the provision of the charter above quoted was mandatory and not merely directory.

Public policy as well as the protection of private property demanded this conclusion.

The manifest object was to prevent improvident legislation by the city council; to create a circumspect body that would stand between the street contractor and the city treasury—between the lot owner and the tax collector—between the citizen and the almost absolute power of the city council, and see that no wrong was committed.

The council not having taken the steps which gave it a right to contract, or to create a lien upon the lots of the appellant, for the cost of the improvement in question, and which action was a condition precedent to the exercise of its power to do so,

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or to make the assessment, the judgment below is reversed and cause remanded, with directions to render a judgment making the plaintiff's injunction perpetual and for any further necessary proceedings in conformity to this opinion.

Hallam & Perkins for appellant.

M. L. Roberts and J. P. Harrison for appellee.

KENTUCKY CENTRAL R. R. CO. v. BARROW.

(Filed December 4, 1883.)

1. Railroads—Damages—Escaping sparks—B. sued the railroad for damages to his fences and crops caued by sparks escaping from passing trains, Held—Where a railroad provides itself with the screens for its locomotives required by statute to prevent sparks from escaping it is not liable in private actions or to indictment for such damages.

2. Evidence—Custom—In the absence of direct evidence as to the condition of the particular locomotive, evidence was admissible of the general custom of the road to run its locomotives with the screens thrown back so that the escape of sparks was not prevented.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellee to recover of appellant damages for the burning and injury to his fence, grass, hay and other property, alleged to have been ignited by sparks of fire that escaped from the chimney of a locomotive engine as it, with a train of cars attached, passed along a railroad owned and operated by appellant, adjacent to the farm of appellee.

The jury returned a verdict in favor of appellee, and judgment having been rendered accordingly, this appeal is prosecuted.

The only errors presented to the lower court as grounds for a new trial, and consequently, as has heretofore been held, the only ones that can be considered on this appeal, relate to the competency of certain evidence admitted on the trial and to the instructions.

In the first paragraph of the petition it is stated that the sparks of fire by which the premises and property of appellee

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were burned and injured escaped from the chimney of appellant's locomotive engine by reason of the failure of those operating its train of cars to comply with the requirements of an act of the General Assembly, entitled "An act to protect the owners of property in this Commonwealth against damages by fire from steam cars," approved January 30, 1874. And in the second paragraph it is stated that the injury complained of was caused by the negligence of those in charge of the train.

The act referred to is as follows: "Be it enacted, etc., that it is hereby made the duty of all railroad companies or persons running or operating cars by steam on any railorad track or tracks in this Commonwealth to place on or around the tops of the chimneys of such car or locomotive a screen, fender, damper or qther preventive as will prevent so far as possible sparks of fire from escaping from such cars into fields, pastures or outlands, or igniting any timber or grass, hay, corn-stalks, house, stable or any combustible matter whatever."

"Section 2. Any person or railroad company failing to comply with the provisions of the first section of this act shall upon conviction be fined in any sum not exceeding $200 for each offense, recoverable by indictment, besides being responsible to any person injured by fire escaping from cars run or operated by them; such damages may be recovered in any court having jurisdiction of the same," etc.

In some of the States railroad companies are by statute made absolutely liable for injuries caused by fire proceeding from their engines, irrespective of any question of negligence. But as such companies are in this State authorized by law to operate their railroads by steam, which necessitates the use of fire, they should not on principle, in the absence of a statute requiring it, be held liable for injuries unavoidably produced by fire kept and used to generate steam. And that view is in harmony with the act just quoted. For persons and companies operating railroads are not required by that act to provide appliances that will effectually and certainly, under every condition, prevent the escape of sparks of fire from the chimney of

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their locomotives and cars, but only to provide and use the best and most effectual preventive known to science, so as to prevent, as far as possible, injury being done, in the mode described in the statute, to property near railroads.

Therefore, while the act does not, nor was intended by the legislature to, preclude a person injured by the negligent or careless operation of a railroad in other respects from maintaining an action for damages, it was obviously not the purpose of the act that those owning and operating railroads should be liable either to indictment or action for damages for injury done by the escape of sparks of fire from locomotive chimneys, except when they failed to apply and use the appliances for preventing it required by the act.

It appears that the fire which injured and destroyed the property of appellee occurred September 5, 1881, and evidence was introduced on the trial in support of the allegation that it was caused by sparks of fire that escaped from the chimney of the locomotive that, with a train of cars attached, passed the farm of appellee about noon of that day. It, therefore, became a material question of fact about which the evidence, though entirely circumstantial, was contradictory, whether the screen or fender attached to the chimney of the locomotive was open or closed when that train passed. For it would be no defense to the action to show that the appliance required by the statute was attached to the locomotive chimney if not closed while the train was moving, it being useless as a preventive if kept open.

The evidence introduced on the trial of which appellant complains was substantially that trains frequently set fire to fences and grass at other places in the vicinity of appellee along the line of that road, and at different times during the fall of 1881. It was also stated that the trains usually passed with the screen or fender up or laid back.

The question before the jury was whether the fire that burned and injured appellee's property was caused by sparks that escaped from the chimney of appellant's locomotive, for no evidence was introduced tending to show it originated other-

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wise, and as it was necessary to resort to circumstantial evidence to show the origin of the fire, it was competent to introduce any evidence having a direct bearing upon the question.

In the absence of direct evidence as to the condition of that particular locomotive on that occasion reference to evidence as to the usual condition of appellant's engines which are run on that road is competent.

In the language of the court, in the case of Sheldon v. The Hudson River Railroad Company, 14 New York, 218, "the business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of the operation."

The question in that case was whether sparks and burning coals were frequently dropped by engines passing on the same road and upon previous occasions. And the evidence was held competent to show that about the time when it happened the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned.

The same doctrine was announced in the subsequent case of Field v. N. Y. C. R. R., 22 N. Y., 339.

In our opinion the reasons given in the case referred to in favor of the competency of the evidence then considered apply to this case, and that the evidence objected to was properly admitted by the court.

We perceive no error in any of the instructions given to the jury when considered together, as it must be presumed they were so considered by the jury.

The jury was told in language sufficiently plain and intelligible that they could find only compensatory damages, and were also told that they were not authorized to find for the plaintiff unless they believed the injury to appellee was caused by fire communicated to his property from the locomotive of appellant.

The judgment must be affirmed.

O'Hara & Bryan for appellant.

Haggard & Jones and H. L. Stone for appellee.

November, 1884—2

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COMMONWEALTH v. MASON. SAME v. SAME.

(Filed October 13, 1884.)

1. Warehouse law—Indictment under—A was indicted under the warehouse law for fraudulently selling tobacco in violation of his warehouse receipt previously issued, agreeing to deliver it to the bearer of the receipt, Held—The indictment was not demurrable, though the receipt as described made the tobacco deliverable to bearer and not to order.

2. Same—He was also indicted under the same law for fraudulently selling tobacco belonging to B for which he had previously issued a receipt, agreeing to deliver it to C, Held—The indictment was bad because a warehouseman has no authority to issue a receipt to one for the property of another. The indictment is bad under the factor's act also.

3. Statutory construction—General Statutes do not repeal the warehouse law. General Statutes, chapter 29, entitled "Crimes and Punishments," is not a complete statement of the law.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Hines.

In this record there are two indictments against appellee, to which demurrers were sustained. The Commonwealth appeals in each case. As many of the questions presented are applicable to both cases we will consider them in one opinion, but separately, and in the order in which they appear in the records.

The first indictment charges that appellee, being a warehouseman engaged in the business of receiving tobacco in store, and having in store certain hogsheads of tobacco designated by numbers, borrowed of the Louisville Banking Co. a sum of money, to secure the payment of which he executed a receipt to the company for this tobacco, and susbequently fraudulently sold the tobacco to others without the consent of the banking company, and without the return of the certificate.

The indictment charges that the acts complained of were in violation of the seventh section of an act in relation to warehousemen, approved March 6, 1869.

That section reads: "That no warehouseman or other person shall sell or encumber, ship, transfer, or in any manner remove, beyond his immediate control, any goods, wares, merchandise, produce, commodity, property or chattel, for which a

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receipt or voucher shall have been given, without the written consent of the person or persons holding such receipt, and the production of the receipt."

The eighth section provides that any persons who shall violate, willfully and knowingly, any one of the provisions of the act, or any part of any one of its provisions, shall be fined not exceeding $5,000, and imprisoned in the penitentiary not exceeding five years.

The first question we will consider is whether the act of 1869, upon which the prosecution is based, has been repealed by the General Statutes that went into effect on the first of December, 1873.

The act adopting these statutes provides that all statutes of a general nature in force when the General Statutes go into effect, and which are repugnant thereto, are repealed. This general law in regard to warehousemen was in force at the time of the adoption of the General Statutes, and as there is nothing in those statutes in reference to warehousemen or their duties, and no express repeal of the act of 1869, it is in full force in all its features unless repealed by implication, as insisted by counsel for appellee on the authority of Broaddus v. Broaddus, 10 Bush, 299. That case, giving it the broadest construction, decides only that where, under the head of a subject is grouped provisions in reference to it which are comprehensive in their character, the presumption arises that the intention of the legislature was to make such provisions, so grouped, the whole law as to that subject. Such implied repeals are not favored, and although the fact of revision raises the presumption that it was the intention to establish a complete code of laws to be found in this revision, the provision of the adopting clause that laws of a general nature not repugnant to the revision should remain in force shows that the legislature understood the impossibility of making the revision so complete as to embrace all general legislation. This provision of the adopting act avoided the necessity of the republication of general laws then in force, and guarded against oversights and omissions necessarily incident to all statute revisions and codifications.

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This court, in Cochran & Fulton v. Ripy, Hardié & Co., 13 Bush, 45, involving the rights of parties to property for which a warehouse receipt had been issued, held that the act of March 6, 1869, in reference to warehousemen, had not been repealed by the General Statutes because this was a general law, not repugnant to anything in the General Statutes, no provision having been made therein as to warehousemen, their duties or liabilities. But it is insisted for appellee that the only question raised, and necessarily decided in that case, was that the civil provisions of that statute were not repealed by the adoption of the General Statutes, and that by reason of the fact that crimes and punishments are treated of in the General Statutes under a common head, the criminal and penal provisions are, by implication, repealed according to the rule applied in the case of Broaddus v. Broaddus, supra.

There are two reasons why we think the rule in that case can not be made to apply: First, under the head of "Crimes and Punishments," in the General Statutes, chapter 29, is not found all the law in that revision on this general subject. For instance, under the heads of "Elections," "Gaming," "Husband and Wife," "Office and Officer," "Peddlers," "Penitentiary," "Public Buildings," "Roads," "Small-pox," "Vagrants" and "Weights and Measures," offenses are defined and penalties are denounced, none of which are found under the head of "Crimes and Punishments." So that the reasoning in the Broaddus case, to the effect that under a general head, such as "Wills," all the law applicable to that subject must be found, does not apply in a case where the provisions as to a common subject-matter, and properly embraced under a common head, are distributed indiscriminately throughout the statute.

In the second place the construction contended for by appellee's counsel ought not to be adopted because the act of 1869 was evidently intended to be, and must necessarily be, considered as a whole. Without the penal clause in the act it would be inoperative for the main purpose contemplated in its passage. The commercial character intended to be conferred on

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warehouse receipts, in order to utilize as a basis of credit commodities not otherwise available, would be destroyed, and thereby the whole object of the law defeated. As it has been held that the civil provisions of the law are in force, and were not intended to be repealed by the General Statutes, it must be presumed that its penal provisions, which are necessary to its effectiveness, were also intended to be adjudged in force, although there is no express declaration to that effect in the case of Cochran & Fulton v. Ripy, Hardie & Co., supra. The appropriateness of having the penal clause of an act of a general character, prescribing duties in the body of such an act, appears to have been recognized by the legislature in placing the provisions for punishment of a violation of a law in regard to any specific subject-matter under the general subject designated, instead of under the comprehensive and general head of "Crimes and Punishments," as illustrated by the instance cited from the General Statutes.

It is further insisted for appellee that the demurrer was properly sustained because the instrument declared on is not a warehouse receipt within the meaning of the statute, because the property is made deliverable to "bearer" instead of to "order." This seems to be based upon the third section of the act of 1869, which provides that "all receipts issued by any warehouseman, as provided by this act, shall be negotiable and 'transferable by indorsement in blank, or by special indorsement, and with like liability, as bills of exchange now are, and with like remedy thereon.' "

The second section of the act prescribes the only formality in the execution of a receipt, compliance with which, it seems to us, with a subsequent fraudulent disposition of the property so receipted for, would render the warehousemen subject to the penal provisions of the law. That section is: "That every warehouseman receiving anything enumerated in section 1 of this act shall, on demand of the owner thereof for the person from whom he receives the same, give a receipt therefor, setting forth the quality, quantity, kind and description thereof,

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which shall be designated by some mark, and which receipt shall be evidenced in any action against said warehouseman."

The receipt in this case complies with all the requirements of the last quoted section as to "quantity, quality and kind," and identifies the property by mark, while the third section says that "all receipts issued by any warehouseman as provided by this act shall be negotiable." The negotiability of the receipt exists when there is a substantial compliance with the statute as to description for identification, and it is negotiated by indorsement in blank, or by special indorsement. The second section describes the character of receipt that shall be negotiable, and the third provides the manner of negotiation.

The second indictment states that the appellee, being engaged in receiving tobacco in store as a warehouseman and in selling tobacco as a factor, had in store a certain described hogshead of tobacco which he pledged to the Second National Bank, of Louisville, for money loaned him, which tobacco appellee subsequently fraudulently sold without the consent of the bank, and without the return or production of the receipt issued to the bank by the appellee. The receipt as set forth in the indictment reads:

"PEOPLE'S TOBACCO WAREHOUSE.

"D. K. Mason & Co., Proprietors.

"Nos. 906, 908, 910, 912, Main Street.

"Louisville, Ky., December 19, 1883.

"Received on storage and for sale, from Mr. J. D. Ryan, one hogshead of tobacco, marked R. & M., No. 62, gross, 1,370; tare, 180; net, 1,190; cost, $6.50; amount, $77.35; which will be delivered to the order of Second National Bank upon presentation of this certificate.

"Parties storing cotton with us must effect their own insurance. D. K. MASON & CO."

This indictment is not good either under the warehouse act or under the factor's act, approved May 5, 1880. The warehouse act authorizes a warehouseman to issue a receipt for commodities to the owner or the person from whom such commodities are received, and to issue receipts upon his own prop-

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erty so warehoused. Under the act the warehouseman has no authority to issue a receipt to one for the property of another in store with him as a warehouseman. The receipt shows the property did not belong to appellee; that it did not belong to, nor was it received from, the Second National Bank, but in terms the receipt recites that it was "received on storage and for sale from J. D. Ryan." With this notice to the bank the receipt or certificate was not an instrument that could be used to perpetrate fraud, and, therefore, not within the evil intended to be provided against by the warehouse act.

Is the indictment good under the factor's act? We think not. The first section of that act provides that "every factor or agent instrusted with the possession of a document of title to merchandise, or with the possession of merchandise, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such factor or other agent with any other person for the sale or disposition of the whole or any part of such merchandise for any money paid or advanced, or negotiable instrument given, or existing security surrendered by such other person."

The seventh section of that act provides that any such factor or agent who shall sell any merchandise intrusted to him "with the intent to defraud the true owner," shall be fined not exceeding $1,000 and confined in the penitentiary not exceeding five years.

The indictment is defective under this act because it does not allege that the property was held as factor, the ownership, or that the property was disposed of by appellee with the intent to defraud the true owner, but, on the contrary, the indictment charges that the property was sold by appellee with the intent to defraud the Second National Bank, besides, upon the face of the receipt there was notice to the bank that appellee was acting, in pledging the property, beyond the scope of his authority, and there was no evidence on the receipt that there were any charges or advancement which would have authorized the pledge.

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Judgment is reversed on the first indictment and affirmed on the second.

W. O. Harris and H. Clay for appellant.

W. Lindsay for appellee.

BAGBY v. CHAMP, &c.

(Filed September 23, 1884.)

1. In suit against A and wife personal judgment was rendered against him and judgment for sale of her land. They were afterwards divorced and she sued to vacate the judgment of sale on the ground that she was a married woman when it was rendered, and had defenses which she was not allowed to set up. Held—Under Civil Code of 1877, section 518, a married woman can not vacate a judgment. The rule was otherwise under Code of 1852.

2. Constitutional law—Impairing contracts—The Code of 1852 was in force when the judgment of sale was entered. Held—Change made by Code of 1877 altered the remedy only, and did not impair the obligation of a contract.

(Compare Price v. Kenney, &c., 5 Ky. Law Rep., 706, where a married woman was allowed to attack collaterally a judgment against her. No reference was made to the bearing of either Code on the subject.—Ed.)

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

In 1866 J. J. Bagby, appellant, Nancy Bagby, his wife, and J. W. Bagby executed their promissory note to appellee Champ, and to secure its payment a tract of land, many years before that time conveyed by the father of appellant to her and her husband, was mortgaged.

An action in equity was instituted by appellee Champ to recover judgment on the note, and to subject the land mortgaged to satisfy it. And in May, 1872, the court, where the action was pending, rendered personal judgment for the amount of the note against J. J. and J. W. Bagby, and also judgment for a sale of the land. And in September, 1872, it was sold in pursuance of the judgment, appellee Champ becoming the purchaser and receiving a commissioner's deed therefor.

This action was instituted by appellant January, 1879, for the purpose of vacating the judgment rendered in favor of ap-

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pellee Champ in 1872, cancelling the mortgage mentioned and recovering the land purchased by him under that judgment.

A general and special demurrer was filed and sustained by the court below to the petition and amended petition, and orders made overruling the several motions to file the second, third and fourth amended petitions.

It appears from the pleadings filed by appellant that at the date of the judgment of 1872 for the sale of the land she was a married woman, but subsequently became, and was when this action was commenced, discovert by reason of divorce from her husband.

It is alleged by appellant that there existed valid defenses to the action of Champ against J. J. Bagby, Jno. W. Bagby and herself, which she sets out, but that J. J. Bagby, who was then her husband, refused and she, by reason of being a married woman, could not present them. But it is not necessary to consider any of the reasons for vacating or modifying the judgment of 1872 relied on by her unless she has the right to maintain this action. The first and controlling question, therefore, is whether she can do so upon the sole ground that when the judgment was rendered she was under the disability of coverture for no other cause is set forth in her pleadings.

By section 579, Civil Code of 1851, it is provided that the court in which a judgment or final order has been rendered or made shall have power after the expiration of the term to vacate or modify such judgment or order for any of the causes there enumerated, the causes mentioned in subsection 5 being as follows: "For erroneous proceedings against an infant, married woman or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings."

There can be no question as to the right of appellant to maintain this action under the Civil Code as it stood at the date of the judgment, all the other conditions therein mentioned existing and being complied with by her. But subsection 5, section 518 of the present Code, which went into opera-

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tion before this action was commenced, is essentially different from the corresponding subsection of the Code of 1851 just quoted. It is as follows: "For erroneous proceedings against a person under disability, except coverture, if the condition of such defendant do not appear in the record, nor the error in the proceedings."

It thus clearly appears that the power, existing under the Code of 1851, of courts in which judgments had been rendered to vacate or modify them after the expiration of the term, upon the ground that the defendant against whom the erroneous proceedings were had was a married woman, has been taken away by the present Code. And now a defendant who may labor under the disability of coverture is restricted to the same remedies under section 518 that persons not under disability have.

It, therefore, follows that unless subsection 5 of section 518 is to be held invalid in its application to this case that the action can not be maintained by appellant.

It is laid down and approved by this court that the right to a particular remedy is not a vested right. As a general rule every State has complete control over the remedies which it offers to suitors in its courts (McArther v. Goddin, &c., 12 Bush, 274). "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract, and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." (Cooley's Constitutional Limitations, 4th edition, page 350.)

In this case the change made in the law as it existed at the date of the judgment in 1872 and until 1877 affects the remedy merely, and does not at all impair the obligation of a contract in the meaning of Constitution, nor take from appellant a vested right.

By subsection 5, section 579 of the Code of 1851 an exceptional remedy for vacating or modifying judgments was given to persons laboring under disabilities, which were withheld from all others. The effect of the corresponding subsection of the present Code has been simply after five years from the date

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of that judgment to take from appellant the right to maintain an action to vacate or modify it upon the sole grounds she was, when it was rendered, a married woman. But for any other cause mentioned in section 579 she may still maintain the action to vacate or modify, and her right to appeal was left undisturbed.

In our opinion subsection 5, section 518 of the present Code is valid in its application and governs this case, and consequently appellant can not, for the cause set out in her petition and amended petitions, maintain the action.

The judgment is affirmed.

Stevenson, O'Hara & Bryan for appellant.

J. M. Collins for appellees.

BRIZZALARO v. SENOUR & NOONAN.

(Filed October 18, 1884.)

1. Estoppel—Recital in deed—Privies—A conveyed to B a city lot by metes and bounds as running to a 10 foot alley. A subsequently conveyed the adjacent lot, including the 10 feet described as an alley, to C. The 10 feet had never been actually laid off or dedicated as an alley. Held—The recitals of the deed are sufficient to estop A from denying the use of the 10 feet to B or his grantee, but pass no right as against B or his grantee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Brizzalaro, instituted this action obtaining an injunction and seeking to recover damages of the appellee for obstructing an alley by building upon it, which is alleged was granted to his vendors by one Arnold, the original owner of the estate, and under whom it is alleged both the appellant and appellees claim.

The law and facts were submitted to the court and a judgment rendered for the defendants.

Arnold, the original owner of the ground in controversy, on the 15th of January, 1867, executed to one Barbaro a conveyance to a certain lot of ground in the city of Covington, defined

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by metes and bounds, and designating one of the lines in the following manner: "Thence northwardly with the east line of said bridge company 65 feet to a ten foot alley (which extends from the east line of the said bridge property to Greenup street, running parallel with said Second street); thence eastwardly, etc."

The ground described in this conveyance was subsequently sold for the purchase money and purchased by the appellant, Brizzalaro, and a conveyance containing the same boundary made to him by the commissioner of the Kenton Chancery Court. He is now claiming under Barbaro's deed. The testimony shows that at the date of the conveyances no such alley had been actually laid out on the ground, nor was it indicated by any plat or map. Arnold conveyed the adjoining property to Mrs. Boyd, including the alley, and she conveyed it to the appellees. The conveyance to Mrs. Boyd was made subsequent to the conveyance to Barbaro. The premises of Barbaro have a front and side entrance, and the decided weight of the testimony is that no such alley had been laid out in fact or on any map or survey by Arnold, who owned the entire property before he executed the conveyances to these parties. After Barbaro purchased and erected his buildings the rear of the premises was not used as an entrance until a year or two before this suit was instituted. The alleged alley divides the premises of appellee and renders the ground useless for the purposes for which the purchase was made. There is but little if any testimony establishing the right of the appellant to the use of the ground as a passway, and the entire case must depend upon the construction given the conveyance by Arnold to Barbaro. If by the terms of that instrument the easement is conveyed it settles the question.

It does not appear from whom Arnold derived title, and, therefore, the right to the use of the alley by the appellant is derived alone from Arnold's conveyance to him.

It is clear that this ground in controversy was never dedicated to public use. The recitals in the conveyance to Barbaro

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did not amount to a dedication, nor is it pretended that there was any such use as gave to the citizens the right of way. The plaintiff (the appellant) alleges in his petition that the existence and convenience of this alley formed a part of the consideration for the purchase, and it may be that the recitals in the conveyance would estop Arnold, his heirs and privies from controverting appellee's right to the way. The question, however, presented in this case is, in what manner is the appellee, who purchased other land from Arnold not embraced in the grant to Barbaro, affected by this estoppel on Arnold, conceding for the purpose of this case that such a recital works an estoppel? The appellee does not claim to hold under the deed to Barbaro, nor was there any deed made to Arnold, the vendor of both these parties, containing such a recital.

Appellee is, therefore, a stranger to the conveyance, and, although purchasing from the same vendor, can only be affected by the terms of the grant to Barbaro, if that granted the right of way over this ten feet of ground, the deed to Barbaro, having been first executed and recorded, is notice to the appellee of the existence of the right. In Thomas v. Poole, 7 Gray, 33, the boundary described was "by a new way or street now staked out, and to be opened by the grantor thirty feet wide," was construed to be a covenant that the way should be opened as staked out, and that the deed duly recorded was notice to subsequent purchasers from the grantor. There was at least a covenant on the part of the vendor to open this street, the language of the conveyance plainly importing an obligation upon him to do so. It was also held in the case of Tufts v. The City of Charlestown, 2 Gray, 271, that a conveyance of land bounding "on a passage way of two rods wide which is to be laid out between the premises and land of A, the grantor to make and maintain all the fence between the passway and the premises, estops the grantor and those claiming under him to deny the existence of the passway." In the case of Parker v. Smith, 17 Mass., 413, there was an express grant of the privilege in all the ways or streets to be laid out in the new settlement, to be

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used in common with the other owners of the lots in this new settlement, and some of the ways described. It was held in that case that an implied covenant existed that there was a way as described in the deed, although not then in existence.

In all of these cases there is something more in the conveyance than the mere recital as to the boundary.

Here the extent of the calls of the appellant's deed is "to a ten foot alley (which extends from the east line of said bridge property to Greenup street, running parallel with said Second street); thence eastwardly with south line of said alley forty-eight feet; thence at right angles southwardly sixty-five feet to Second street, the place of beginning."

It is a mere recital in the conveyance that an alley exists at a particular place, when such is not the fact, and may operate to prevent the grantor from contradicting the fact that such an alley is in existence. It amounts to nothing more than an estoppel, and is not a grant of the alley or the easement as appurtenant to the premises. Such an alley appears on no plan or map, was never laid out on the premises by any survey, and the language used can not be tortured into an express or implied grant. The grantor may have designed to open this alley and nothing more, or the intention on his part may have constituted a part of the consideration of the purchase as between the parties to the conveyance, yet if there is not a grant of the land constituting the alley it can not affect an innocent purchaser, although recorded.

When parties enter into a written agreement respecting the title to realty it is easy for them to express its terms in language so plain as not to mislead others, and a court ought not, as against a third party, imply a grant unless such must be the necessary conclusion from the language used.

The grantor, Arnold, may not be permitted to deny what he has stated in his deed, although untrue, but this does not amount to a grant. The issue as between the grantor and the grantee in this case, if there were no parties before the court

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but Barbaro and Arnold, would be not as to whether the way in fact exists, but is the grantor estopped to deny that fact? The recital in the deed is simply an admission that certain facts exist, and whether true or false is not material or the subject of inquiry as between the parties. If Arnold has conveyed his interest to Barbaro and the latter's deed of record, this would affect any subsequent purchase from Arnold. A mere recital, while it may work an estoppel, neither vests or divests the title, but does preclude the party making it from denying what he has stated. The appellee was neither a party or privy to the conveyance from Arnold to Barbaro. Washburn says that "a deed duly recorded is constructive notice of its existence and its contents to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons."

Appellee is claiming to have purchased his land of Arnold, but he is not claiming under the deed in which these recitals appear. If Arnold, the common grantor, when purchasing this entire property had inserted in his conveyance recitals that would work an estoppel, then it would affect all who purchased from him. An estoppel affects parties and privies but not strangers. The original grantor owning in fee this entire block, having sold a part to A, another to C and another to B, the latter purchasers would not be affected by a recital in the deed to A unless it amounted to a grant. All are not privies when purchasing different tracts of land because they happen to claim under the same grantor. Parties and privies means the parties and persons to the particular conveyance. The grantees of Barbaro are not privies to Mrs. Boyd's deed, nor Mrs. Boyd's grantees privies to Barbaro's deed. They are privies to Arnold, but only as to the property conveyed by their respective grants.

In Harding v. Wilson, reported in 2 Bar. & Cres., 96, English Common Law, the lease of the premises described them as abutting on an "intended way of thirty feet wide," it was held not to constitute a grant, but a mere intention to open a street of that width. All the judges so agreed, but said that

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the lessee was entitled to a passway as matter of necessity, but the language used did not control the action of the lessor, so a convenient way was left. In Hopkinson v. McKnight, 31 New Jersey, 422, the description in the deed bounded the lot "a certain length in an eight foot alley, and a certain additional length along said alley and street, said street being thirty feet wide, neither were open or used." It was held that this language did not amount to a grant of a way or a covenant to that effect. Whether this case has gone too far in denying the remedy sought is not necessary to be decided. "A mere reference in the deed to an intended way, without an express grant, will not pass such way." (Washburn on Easements, 2d edition, page 325).

The only question, it seems to us, in this case is, are the appellants affected by the constructive notice, viz., the recording of the conveyance? If privies to the deed, it might be argued that they are purchasers with notice, but being strangers to the conveyance, under which appellee claims, the recitals in the deed do not conclude them, although they have purchased from the same grantor. As to the dedication of this property for public use there is no proof of that fact or of its acceptance by the city, nor does the appellant by his petition place his right of recovery on that ground, but for the reason, as he maintains in his pleading, if not in his brief, that the right to the easement passed by the deed from Arnold to Barbaro, through whom appellant claims.

The judgment below must be affirmed.

Fisk & Fisk for appellant.

Benton & Benton for appellees.

BAMBERGER, BLOOM & CO. v. CITY OF LOUISVILLE.

(Filed October 11, 1884.)

1. **Taxation—License—Exemption—A merchant residing in the city of Louisville, who pays a license tax on his merchandise, is liable for further taxation under the act of April 8, 1880, in aid of common schools, under act of March 30, 1880, in aid of certain railroads, but he is not liable to taxation for improvement of the city's streets or for other strictly municipal purposes.**

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Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The question presented in this case arises from an agreed state of facts, and on the hearing below the judgment was adverse to the appellants, and from which they appeal.

The appellants, Bamberger, Bloom & Co., are wholesale merchants in the city of Louisville, doing a large and extensive business in the sale of dry goods, and having paid a license, or what is denominated a license tax, as required by the city, they claim that they are not liable to pay any tax on their merchandise other than this license tax.

They claim this exemption by reason of a legislative enactment approved the 8th of April, 1882. That act is entitled an act to amend the charter of the city of Louisville, the object of its provisions being to determine the kind of property to be assessed and to regulate the mode of its assessment for the municipal wants of that city.

The second section of that act fixes the time at which the property is to be assessed, and the kind of property to be listed, embracing all property liable to taxation under the revenue laws of the State, with this proviso: First. "That merchandise on which a license tax is charged and paid shall not be liable to be assessed under the provisions of this act."

Under an act of the legislature passed on the 8th of April, 1880, the city of Louisville was constituted into a school district, section 1 of the act providing as follows: "The city of Louisville is hereby constituted a school district, which shall be under the management and control of the board of trustees, etc., of the city of Louisville, and all the property therein, both real, personal and mixed, including money, choses in action, except such things as are exempt from taxation by the laws of the United States and Kentucky, shall be assessed and taxed for school purposes in said district, provided that such assessments shall only be made on personal estate, money and

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choses in action, so far as the same shall be in excess of the owner's debts, etc."

By an act passed on the 30th of March, 1880, with reference to the charter of certain railroads and the subscription made thereto by the city, it was enacted "that the general council of said city shall, for the purpose of providing for the payment of the principal and interest of the bond, issued by said city for the payment of the Elizabethtown & Paducah Co., and the bonds issued to the Louisville, New Albany & St. Louis Air Line Railroad Co., continue to levy annually, and cause to be collected, a tax of thirty cents, etc., on property subject to taxation under the revenue laws of the State of Kentucky, and said levy shall continue to be made so long as it may be necessary to pay the principal and interest of said bonds."

Neither the act of April 8th, 1882, nor the repealing clause of that enactment can be regarded as conflicting with these special enactments or inconsistent with the right to coerce payment in the way of taxes for school and railroad purposes. When adopting the act of 1882 it was never contemplated by the law making power or those in charge of the city government that they were affecting the special taxation for school purposes, or relieving that portion of its population known as merchants from assuming their proportion of the burden assessed by the corporation for the continuation of railways leading to and from the city. That act was to regulate and fix the mode of assessing city property for municipal purposes, and had no reference to the common school system or to taxation imposed by reason of railroad charters to aid in the construction of such roads. The act of April 8, 1880, was but creating a common school district out of the city of Louisville, and in such a case it was held, in Courtney v. The City of Louisville, 12 Bush, 419, that while property, by reason of its peculiar location, was not liable to taxation for strictly municipal purposes, the legislature might constitute the city into a school

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district and levy a tax on all the property within its limits, regardless of the benefits to be derived from the city government.

This the legislature has done in express language by the act of the 8 of April, 1880, and we see no reason for making this special enactment fail by reason of the act of April 8, 1882.

In the case of the City of Henderson v. Lambert, reported in 8th Bush, 607, the act of incorporation made certain realty of Lambert exempt from taxation, and while this exemption existed the corporate boundary was made a school district and taxes levied for common school purposes by the city council. It was held that the tax being a special common school tax and not a municipal assessment the property was liable to taxation for school purposes.

So in this case, when legislating with reference to taxation for strictly municipal purposes, it was not intended to affect special enactments with reference to the common or public schools, and to hold otherwise would not only amount to a repeal by implication of this special law, but relieve the appellant from a burden that he should, as a matter of right and justice, contribute to discharge.

The same reason applies to the tax imposed in aid of railroads by virtue of the charters under which these roads are constructed. These provisions of the railroad charter are sought to be repealed by implication, when forming no part of the city charter or necessary to the existence of the city government. It is true the city will have to levy a tax to pay its subscription to these roads, but this is not within the range of taxation required or essential to the existence of the corporation, and can not, therefore, be said to be a tax for a strictly municipal purpose, such as is contemplated by the act of the 8th of April, 1882.

This court, in Courtney v. The City, supra, said: "Taxes to meet railroad supscriptions are not levied under the authority of the charter of the city, but under the authority given in the charters of railroad companies, and while one's property may be so situated with reference to the population of the city as

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not to be taxable for strictly municipal purposes, we perceive no reason why it may not authorize property within the corporate limits to be taxed for railroad purposes.

A special enactment applicable to a particular locality or for a special purpose may be in conflict with a general law and still enforced in the absence of its repeal, either in express terms or by necessary implication. (Commonwealth v. Weller, 14 Bush, 218.)

We perceive no reason for exempting the appellant from the payment of the school tax, and the tax in aid of the railroads, and to that extent the judgment must be affirmed.

Having concurred with the court below in many of the reasons assigned for affirming this much of the judgment, we are not disposed to hold that the appellant is liable to be taxed for the reconstruction of the streets and ways of the city.

The liability for the school and railroad tax is based principally on the idea that the act of April, 1882, regulating assessments of property within the city for muncipal purposes did not take from the council the power to cause assessments to be made under special enactments for purposes not strictly municipal. When brought to consider the enactment in regard to the reconstruction of the streets and ways of the city the purpose is purely municipal, and the act of April 8, 1882, must exempt merchandise from this character of taxation unless the mandatory clause of the enactment controls the effect to be given that act. "The general council shall annually assess the property subject to taxation under the revenue laws of the State, not exceeding thirty cents." This is for the reconstruction of streets and public ways.

It must be conceded that this is but an amendment to the charter of the city conferring upon the council the power to impose a tax for a purely municipal use. It is discretionary whether they will impose such a tax or not, although the language is imperative. The tax may not be required or the council may decline to make the improvements, but if mandatory in its provisions it is not more so than any other power con-

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ferred on the city legislature for raising revenue to pay the expenses of the city government.

Besides, with this amendment to the charter, the act of April 8, 1882, susbequently enacted, provides "that merchandise on which a license tax is charged and paid shall not be liable to be assessed under the provisions of this act—that is, the license when paid on merchandise is deemed by the legislature as its fair proportion of the burden necessary to be raised for municipal purposes. The legislature in that act is providing not only the mode of assessment, but the kind of property to be assessed, and with this provision in regard to the reconstruction of streets and public ways before it, and then a part of the law of the municipal government, it provides by the act of 1882 that no assessment of merchandise shall be made, in effect saying that it shall not be taxed if the owner has paid the license tax. If this construction is not given the provision in question it necessarily follows that there is no exemption, and that all the taxes imposed for a municipal purpose must be paid by merchandise in addition to the license. In this regard we think the court below erred.

The judgment is, therefore, reversed to the extent that it imposes this burden on the merchandise of the city when the regular license tax has been paid. Cause remanded for proceedings consistent with this opinion.

Brown & Davie and A. P. Humphrey for appellants.

R. H. Blain for appellee.

BUFORD v. L. & N. R. R. CO.

(Filed October 21, 1884.)

1. Duress—Confirmation—A was injured in a railroad accident, and agreed to accept $100 and a pass to his home in another State, and release the road from all liability to him; he was then under the influence of opiates and partially insensible. But after he had recovered and was in full possession of his faculties he applied for and accepted the money and pass, but subsequently brought this action against the road for damages. The road claims

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that if he was non compos when he made the agreement, his subsequent act in accepting the ticket and money was a satisfaction; he objects that he was then under duress arising from his pecuniary distress and absence from home. The lower court held that pecuniary distress does not constitute duress. That ruling is reversed.

2. Peremptory instructions—It is improper to instruct the jury peremptorily where there is any evidence, even the slightest, to establish the matter in issue, although the trial judge should be of the opinion that he ought to set aside a contrary verdict.

(For opinion of lower court in this case see 5 Ky. Law Rep., 503 and 595.)

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Chief Justice Hines.

This is an action by appellant against appellee, claiming damages for personal injury alleged to have been caused by the gross negligence of appellee while appellant was a passenger on one of its trains. Appellee denied negligence, alleged contributory negligence, pleaded a compromise and ratification of the compromise.

On the trial the court below, after the evidence on each side had been heard, instructed the jury to find for appellee. The only question we need consider is whether there was error in granting this instruction.

The rule in this State as to peremptory instructions, after issue formed and evidence heard, is that when there is evidence tending to establish a matter in issue the court should not grant such an instruction, although the presiding judge should be of the opinion that if the jury should find adversely to the request for such instruction he would be compelled to sustain a motion for a new trial. This is expressly adjudged in Thompson v. Thompson, 17 B. M., 22, has been followed ever since in numerous cases, and we are not disposed, after so long following it, to disturb it.

To apply this rule to the facts which the evidence in this case tends to establish: The injury to appellant occurred because of an insufficient number of brakes on the train, and from a defect in the road bed at the point where the accident occurred. The day following the injury, which ultimately resulted in the necessity of amputating a leg, appellant, while

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under the influence of opiates to such an extent that he was not conscious of what he was doing, signed a contract by which he agreed to release appellee of any liability in consideration of the payment of appellant's board bill, medical attendance, $100 in money, and transportation to his home in Denver, Colorado. The $100 agreed to be paid was deposited with the agent of appellee at its nearest station, and when appellant had fully recovered his mental faculties he applied to the agent for transportation to Louisville, Ky., which place was en route to his home, but the agent refused to give the transportation unless appellant would receive the $100 under the contract. Appellant alleges and testifies that he was, by reason of the wrong of appellee, among strangers, moneyless and homeless, and, therefore, was compelled to accept the money in order to get transportation. Appellant also testifies that he had never seen, nor did he understand the terms of the alleged agreement at or before the time he received the $100 and the pass to Louisville.

We must assume then, for the purpose only of determining the correctness of the ruling of the lower court in granting the peremptory instruction to find for appellee, that appellant, by reason of the gross negligence of appellee, was injured, and thereby compelled to accept the money under a contract that he was fraudulently induced to enter into and the terms of which he did not understand at the time he accepted the money and the transportation to Louisville.

The court below assumed that, conceding that the contract of compromise was obtained by fraud on the part of appellee and the necessitous condition of appellant was the result of the gross negligence of appellee, the evidence showed a confirmation. The necessary ingredients of a confirmation of a contract obtained by fraud are thus stated by Kerr on Fraud, 269: "In order that an act may have any effect or validity as a confirmation it must clearly appear that the party confirming was fully apprised of his right to impeach the transaction, and acted freely, deliberately, and advisedly, with the intention of

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confirming a transaction which he knew, or might, or ought, with reasonable or proper diligence, to have known to be impeachable. If his right to impeach the transaction be concealed from him, or a free disclosure be not made to him of every circumstance which is material for him to know, or if the act takes place under pressure or constraint, or by the exercise of undue influence, or under the delusive opinion that the original transaction is binding on him, or if it be merely a continuation of the original transaction, the confirmation operates as nothing."

There was evidence tending to show that appellant did not understand the terms of the contract of compromise at the time it was entered into; that he had never seen it and was not fully and correctly informed of its contents at the time of the alleged act of confirmation. The decided preponderance of the evidence is to the effect that appellant did understand its terms, and that he freely, voluntarily, and with the intention to confirm the original contract accepted the pass and the money, but it was not for the court to weigh the evidence upon these matters, as was done by giving the peremptory instruction.

It is insisted that nothing short of duress at common law will vitiate or annul a contract, and upon this idea the court below held that pecuniary distress was not duress. But it is not necessary that there should be technical duress to avoid a contract.

"Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively." (Pomeroy on Equity, section 948.)

This rule is the more appropriate when the pecuniary necessity is the result of the person relying upon and seeking an enforcement of the contract.

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But it is said that is an equitable doctrine not applicable in a common law action like this. Independent of other authority, we are of the opinion that the Civil Code which authorizes equitable defenses in common law actions necessarily carries with it the rules of equity applicable to the disposition of such issues.

For the reasons given the judgment is reversed and cause remanded for further proceedings.

Emmet Field and J. T. O'Neal for appellant.

Wm. Lindsay, H. W. Bruce and Helm Bruce for appellee.

ENGLISH v. THOMASSON.

(Filed October 16, 1884.)

1. Warranty—Defect of title—Rescission—A sold land to B, representing that he had a good title, which he at the time believed, and made a deed with general warranty. He afterwards sued on the notes for the purchase price, and B set up a defect in the title and asked a rescission. Held—Rescission refused. In the absence of fraud, nonresidence or insolvency of vendor, vendee (to whom a deed has been made) must look to the warranty for any defect in the title. Innocent misrepresentation of title is no ground for rescission.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

On April 6, 1874, the appellee, Thomasson, sold to the appellant, English, a lot of land in the city of Louisville for $700, payable in four equal payments and in one, two, three and four years from the date of the sale.

The deed, which was then made and accepted by English, retained a lien for the payment of the purchase money, and also contained a covenant of general warranty as to the title.

The vendee has been in the undisturbed possession of the lot since his purchase, and, having failed to pay for it, Thomasson brought this action against him, seeking to recover a personal judgment, and to enforce the lien.

The defense is that the appellee at the time of the purchase fraudulently and falsely represented to the appellant that he

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had a perfect title to the land, when in fact it was defective as to a part of the lot; that a considerable portion of it is and was at the time of appellant's purchase a part of one of the streets of the city of Louisville, and did not belong to the appellee.

The relief asked by the defendant is a judgment for the value of his improvements, which he pleads as a counterclaim, and a rescission of the contract of purchase.

The testimony shows clearly that when the sale was made the appellee did represent to the appellant that he had a good title to the land, but it also clearly appears from it that he did so innocently, and believing that the statement was true.

The question presented, therefore, is whether a representation as to the title made by the vendor to the vendee at the time of the sale, which the former believes to be true, but which is in fact untrue, will authorize the rescission of the contract, if it has been executed by the acceptance by the vendee of a recorded conveyance containing a covenant of general warranty as to the title, and where there has been no eviction and no ground for equitable interference, such as insolvency or nonresidence of the grantor, exists?

We think not, and our conclusion renders it unnecessary to consider any other question in the case. We do not mean to give any opinion by what is above stated or to intimate whether the title of Thomasson was or was not in fact defective; but admitting for argument sake that it was, yet the defendant is not entitled to the relief asked by him upon the mere ground that this was so, and that the appellee represented differently.

It is insisted by the counsel for the appellant that this is an unsettled question in this State; and that the general rule elsewhere is that the falsity of the representation is sufficient, although innocently made.

A careful review, however, of the authorities has satisfied us that in this State the question is not an open or doubtful one.

It has been repeatedly held by this court that in the absence of fraud or insolvency, or nonresidence of the vendor, that a

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vendee in the peaceable possession of the granted premises, by virtue of a conveyance containing a covenant of general warranty, is not entitled to a rescission of the contract when sued for the purchase money, although the vendor may, at the time of the sale, have represented his title as perfect when in fact it was not; and that in such a case the vendee must pay the money, and rely upon the covenant of warranty in case of an eviction. (Miller v. Long, 3 A. K. Marshall, 1173; Gale v. Commonwealth, 3 J. J. Marshall, 538; Campbell v. Whittingham, 5 J. J. Marshall, 96; Simpson, &c. v. Hawkins, &c., 1 Dana, 303; Taylor v. Lyon, 2 Dana, 276; Duvall v. Parker, 2 Duvall, 182; Trumbo v. Lockridge, 4 Bush, 415; Upshaw, &c. v. Debow, 7 Bush, 442.)

In the case of Simpson, &c. v. Hawkins, &c., supra, the court said: "Indeed where contracts are executed by conveyances we are of opinion that there can be no rescission of a contract in any case unless it has been tainted by actual fraud. If the warranty of title has been broken so as to entitle the vendee to damages, or if the vendee be entilted to damages upon a covenant of seizing, he may apply to the chancellor, where the vendor is insolvent, to set-off those damages against the unpaid portion of the purchase money. The ground upon which the chancellor interferes in such cases is the prevention of the irreparable mischief which might result from the insolvency. He ought not to act upon the principle of rescinding the contract. On the contrary he should affirm the contract and secure to the party such damages as he might be entitled to for a partial or total violation thereof by the obligor. If a deed of conveyance be excuted for any quantity of land, and the vendee is put into possession thereafter, in case he loses half or three-fourths of the land, the law only authorizes a recovery upon the warranty of damages commensurate with the loss. The chancellor must follow the law and not lay hold of such a partial loss, and require the vendor to take back the portion of the land saved, and return the purchase money for that under the idea of rescinding contracts."

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The case of Buford's Adm'r v. Guthrie, &c., when properly considered, is to the same effect. In its opinion the court said: "Where contracts have been fully executed there can be no rescission unless there has been actual fraud; and an innocent misrepresentation as to the state of the title is not such fraud as will warrant a rescission."

Citation from other decisions of this court are needless because, aside from the dicta found in some of them, they all point the same way.

It is true that Justice Story says: "Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be false. And even if the party innocently misrepresents a material fact by mistake it is equally conclusive, for it operates as a surprise and imposition upon the other party." (1 Story's Eq. Juris., section 193.)

The distinguished author doubtless did not intend to, nor does his statement in our opinion, apply to a case of innocent misrepresentation by a party as to the state of his title, where the vendor is not insolvent or a nonresident and the vendee is in quiet possession and has chosen to provide for his protection by a warranty of the title; and in the light of the numerous decisions cited we could not so hold even if supported by such eminent authority.

In this case it is not shown, even inferentially by the testimony, that the appellee believed his title was defective. He had paid for the land and held it under a deed from one Henderson; and if he believed that his representation as to the title was true, then there was no actual fraud as the malus animus, essential to it, did not exist.

A mere mistake or error of opinion as to the validity of his title would not constitute fraud. The warranty, which the appellant chose to accept, was designed to protect him against

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such a representation and is effective for that purpose; and he must await an eviction, if it should ever occur, and then look to his remedy at law upon the covenant in his deed.

The appellant has now been in quiet possession of the property for years under an executed deed containing a covenant of warranty as to the title. The appellee is neither a non-resident nor insolvent; the appellant is not even threatened with a disturbance of his possession; no fraud was connected with the sale to him; and no covenant of the contract has been broken.

Under such circumstances it would open too wide a door, and be dangerous in principle, if this court should undertake to pass upon any outstanding claims or titles, which the claimants are not even asserting, and grant to the vendee, who is now in repose and even ultimately secure perhaps in his purchase, a rescission of the contract.

Judgment affirmed.

Temple Bodley and J. T. O'Neal for appellant.

Mix & Rogers for appellee.

NORTHWESTERN MUTUAL LIFE INSURANCE CO. v. FORT'S ADM'R.

(Filed October 14, 1884.)

1. Insurance—Forfeiture clause—A policy contained a provision that if the insured failed to pay the interest in cash on his premium notes the policy should be forfeitable, Held—The forfeiture was not valid or enforceable.

2. Application of payments—The policy agreeing that the insured should be entitled to a share of the company's profits, Held—The company should have itself applied his share to pay the interest, though the policy also provided that such share should go to pay the principal of the notes.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

On the 17th of January, 1868, in consideration of the annual premium in advance, consisting of an annual premium note of $194, the interest on which was to be paid annually in cash at the date of the maturity of the annual premium, and of the quarterly cash premium of $72.10 to be paid at or before the 17th of January, April, July and October in every year during

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the first ten years of the continuance of the policy then issued, the Northwestern Mutual Life Insurance Co. insured the life of Sugg Fort, for the use and benefit of Virginia C. Fort, his wife, in the amount of $10,000 for the term of his natural life.

The annual premium notes were executed according to the contract in January of the years 1868, 1869, 1870 and 1871, and the interest on each of them, except the last mentioned, was paid up to the date of the maturity of the third annual premium, and the quarterly cash premiums were also paid up to April 17, 1871. But no other notes were given, nor interest or cash premiums paid thereafter.

Sugg Fort died in 1882, and this action was instituted in February, 1883, by the administrator of Virginia C. Fort, who died after her husband, to recover the sum of $3,500, being three and one-half tenths of the amount of the policy. And in an amended petition judgment was also asked for a due proportion of the surplus dividends accruing after the assured ceased to keep up the policy.

The chancellor rendered judgment in favor of the plaintiff for the sum of $3,000, and interest thereon from the time the action was commenced, subject to a credit of $598.60, and interest thereon at the rate of seven per cent. per annum from January 17, 1871, to the date of the judgment, being the amount of the four premium notes left after deducting $77.40, the proportion of the "surplus" on the business of the company for the years 1868, 1869 and 1870, to which the assured was adjudged to be entitled according to the terms of the policy.

From that judgment the defendant has appealed, and the plaintiff prosecutes a cross appeal, the former contending the court erred in rendering judgment for any amount, and the latter that the judgment should have been for $3,500; that he should have been charged with only three of the premium notes; and that the defendant should have been charged with a due proportion of the surplus on the business of each year since January, 1871.

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The following are the provisions contained in the policy that have a bearing on the questions presented:

"The said company doth hereby promise and agree to pay said sum assured * * in sixty days after due notice and proof of the death of the said person whose life is hereby assured, the balance of the year's premium and all notes given for premiums, if any, being first deducted therefrom.

"At each distribution of the surplus after three years from the date hereof, a due proportion of such surplus on each and every year's business during the continuance of this policy will be returned to the said assured.

"And the said company further promises and agrees that if default shall be made in the payment of any premium, it will pay, as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. But in order to secure such proportion of the policy all premium notes must be taken up, or the interest thereon be paid annually in cash on the date of the annual maturity of the premium until the notes are canceled by returns of the surplus, or the whole policy will be forfeited.

"This policy is issued and accepted by the parties in interest on the following express conditions: * *

"3d. If the said premiums, or the interest upon any note given for premiums, shall not be paid on or before the days above mentioned for the payment thereof, * * then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine.

"4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company. * *

"7th. This policy shall not take effect and become binding on the company until the premium shall be actually paid, during the lifetime of the person whose life is assured, to the com-

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pany, or to some person authorized to receive it, who shall countersign the policy on receipt of the premium."

The defendant filed with its answer as an exhibit the four premium notes, which were retained by it from the dates they were respectively given. The first one of them, the others differing from it only as to date, is as follows:

"Milwaukee, January 27, 1868.

"For value received, I promise to pay the Northwestern Mutual Life Insurance Co. $194, with interest at the rate of seven per cent. per annum, which interest shall be paid annually, or the policy be forfeited; this note being given for part of the premium on policy No. 30,330 is to remain a lien upon said policy until it becomes due by limitation, or by the death of Sugg Fort, when the note shall be deducted from said policy unless sooner paid, the dividends on the policy are to be applied to the payment of the notes.

"V. C. FORT, by Sugg Fort."

Neither in the policy, nor in the premium notes, is it stipulated that they are to be paid at any fixed time, or at all events before the death of the person whose life is assured. On the contrary, it is provided that whatever amount of the notes may be due after his death is to be deducted from the sum assured, the only provision for the payment of them or any part of them during his life being contained in the notes, where it is agreed that the dividends on the policy are to be so applied, which it is manifest are insufficient to liquidate them during an ordinary lifetime. It is, therefore, clear that the failure to pay off the notes during his life was not intended to work a forfeiture of the policy.

Nor is the failure to pay any cash premium made a cause of forfeiture, it being expressly provided otherwise. The only ground upon which it can be contended that the contract in terms or by implication provides for a forfeiture of the whole policy is the failure to pay annually the interest on the premium notes. And whether such failure has worked a forfeiture in this case is the principal question.

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The law does not favor forfeitures, and in order to justify the court in enforcing it in this case it should be clearly and unambiguously so expressed in the contract, and the payment of the interest annually should be of the substance of the contract, and not then if the company has waived the forfeiture.

We are not prepared to say that by the terms of this contract, construed and enforced according to the principles applicable to contracts generally, a forfeiture has occurred.

The company in one clause of the policy binds itself to return to the assured at each distribution of the "surplus" after three years from its date a due proportion of such surplus on each and every year's business during the continuance of the policy. No condition is annexed to this undertaking, and we do not, therefore, see how it is possible to avoid the conclusion that the right of the assured to such surplus became vested immediately after the payment of the three annual cash premiums, and the execution of the three first premium notes, which was done before any default in the payment of the interest occurred, or a cause of forfeiture on any account existed.

It is also in another clause agreed in case of default in the payment of any premium the company will pay as many tenth parts of the original sum as there shall have been complete annual premiums paid at the time of such default. It is true it is in the same clause provided that in order to secure such proportion all premium notes must be taken up, or the interest thereon paid annually in cash, on the date of the maturity of the premium until the notes are canceled by return of the surplus, or the whole policy will be forfeited. But it is difficult to reconcile the forfeiting part of this clause with a subsequent one in which it is stipulated that in case of default in the payment of a premium or interest upon any notes "the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine." And it is still more difficult to reconcile it with the preceding clause in which the return of the surplus to the assured is provided for.

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If the rule to construe the language of a contract most strongly against the party employing it be applied in this case, it would not be unreasonable to conclude that it was not the intention to forfeit the entire policy after there had been three complete annual cash premiums paid, and three premium notes executed and interest paid thereon.

But waiving that question we are clearly of the opinion that the stipulation for the cash payment of the annual interest on the notes on the date of the annual maturity of the premium should not be held as of the substance of the contract.

The right of the assured to a due proportion of the surplus dividend shaving, after three years from the date of the policy, become vested, as in our opinion was the case, there was in the possession of the company belonging to her an amount more than sufficient to pay the annual interest on the notes executed by her. This fund she was entitled to have returned to her, or applied to the payment of the interest accruing on the notes. It is true there is a stipulation contained in each note that "the dividends on the policy are to be applied to the payment of the notes." But it would not be inconsistent with that stipulation, nor with the right accorded to obligors of notes generally, for the assured to have the election to apply the surplus dividends belonging to her to the payment first of the interest. Nor would the company have a right to complain or be injured by such an application of the dividends; for by this process interest at the unusual and excessive rate of seven per cent. would be annually compounded, while the interest bearing principal of the note would remain intact.

But whatever may have been the rights of the assured in respect to the application of the surplus dividends belonging to her, the company has neither returned to her any part of them, nor credited the notes thereby. Having then appropriated and used for its own benefit the fund, which was more than sufficient to pay the interest on the notes, the company should not be now permitted to claim a forfeiture upon the ground of the nonpayment by the assured of that interest.

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Moreover, by the terms of the contract the annual payment of the interest as well as the ultimate payment of the notes was secured; for the lien retained on the policy comprehended the interest as well as the principal, and the company was fully indemnified against the loss of either.

There are, therefore, two reasons why the forfeiture of the entire policy should not be enforced. In the first place, having funds of the insured in its possession more than sufficient to pay the annual interest, which it has not accounted for otherwise, the company should be held to have applied it to the payment of the interest, and consequently there has been in legal contemplation no default on the part of the assured in respect to the annual payment of the interest.

In the second place, inasmuch as the company was fully secured against loss of either principal or interest, and in fact had in its possession the means with which to meet the interest, the forfeiture provided for in case of default in payment of the interest must be regarded "as a penalty to secure not the ultimate, but the prompt payment of such interest," and, therefore, not enforceable.

This question has been already passed upon by this court in the case of St. Louis Mut. Life Ins. Co. v. Grigsby, 10 Bush, 317, and as we think the ruling was correct it must be adhered to.

It is true in that case, after a default in the payment of cash premiums, the policy was commuted, and a new certificate issued. But the question whether default in the payment of the annual interest worked a forfeiture of the policy was presented, considered and decided by the court.

There it was held that as the default was only in time, and as the company could be given all that it stipulated to receive, a case was presented in which relief against a forfeiture could and ought to be afforded.

Here the default, if any has occurred, is not of the substance of the contract, but in time of the payment of interest, and the company can be given all that it stipulated to receive. On

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the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is fully secured in the ultimate payment of, if not already paid, would impose upon the assured the entire loss of the premiums actually paid.

A forfeiture under such circumstances would be extremely oppressive, and if provided for in a contract between individuals concerning any ordinary business transaction be held as in the nature of a penalty. And as we are unable to perceive any reason for changing or relaxing the rule in respect to contracts about the business of life insurance, the forfeiture provided for in this case must be likewise so held.

It is, therefore, not necessary to decide whether there has been any waiver of the forfeiture by the company.

We do not, however, agree with counsel for appellee that he is entitled to recover more than three-tenths of the sum assured. For the language of the policy is that if default be made in the payment of any premium the company will pay only "as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default."

It is not pretended that more than three complete annual premiums have ever been paid, and hence only three-tenths of the sum assured can, according to the contract, be recovered. To render judgment for more would be to disregard the language and pervert the obvious meaning of the contract.

There is no provision for canceling any of the notes. And as the one executed in January, 1871, was voluntarily given by the assured, appellee should not be permitted to repudiate it, but it must be regarded, like the other three, as forming part of the consideration for what he is seeking to recover from the company.

Nor do we think that after the assured refused to pay any other cash premiums, to execute any other notes, or to make cash payment of the annual interest she was entitled to a full participation in the profits; certainly no more than necessary to offset the interest accruing on the notes given.

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Wherefore, the judgment is affirmed on the original and cross appeal.

Barnett, Noble & Barnett for appellants.

Temple Bodley and C. S. Grubbs for appellee.

SUPERIOR COURT OF KENTUCKY.

PULMAN PALACE CAR CO. v. GAYLORD.

(Filed October 29, 1884.)

1. Sleeping car company—Liability of—A, while occupying a berth on a sleeping car, had his diamond pin stolen from the berth, as he alleged, without negligence on his own part. Held—A sleeping car company is not liable in such cases unless negligence is shown on its part or on the part of its servants. The common carrier's or inn-keeper's liability does not apply.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Richards.

T. G. Gaylord sued the Pullman Palace Car Co. to recover $300, the value of a diamond scarf pin stolen from him while a passenger on one of the defendant's cars. A demurrer having been overruled to the petition, and the company declining to plead further, a judgment was rendered for the plaintiff, proof as to the value of the pin having been waived.

The material facts admitted by the demurrer are that plaintiff, being the holder of a first-class ticket from Chicago to Louisville by way of the Louisville, New Albany & Chicago Railroad, purchased from the defendant, for the price of $2, a ticket entitling him to a berth on its car attached to the train on said road; that he entered said car at night, and was assigned a berth by the officer in charge; he disrobed himself, placing the scarf, which was worn by him and contained said pin, in the receptacle at or near the end of the berth within the walls of the subappartment called the section; that said receptacle, at or near the head of plaintiff's bed, had been prepared by the company for such articles; that thereafter, while he was asleep, said pin, without the fault of the plaintiff, was stolen from said receptacle, and has not been returned, though

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demanded of the defendant; and that said pin was such as persons in plaintiff's social and pecuniary condition in life ordinarily wear as a proper article of dress. There was no allegation that the loss was occasioned by the negligence of the defendant, or that its agents in charge of the car had not exercised reasonable care in watching over the sleeper

It is conceded by the learned counsel for the appellee that as to this loss the defendant can neither be regarded a common carrier, nor an inn-keeper; but he insists that the reasons which underlie the principles of the common law making the carrier an inn-keeper, liable to the owner for the loss of goods, extend to this case, and that, therefore, the same rules should be applied in determining the defendant's responsibilities.

The common law made the carrier of goods received for transportation an insurer for their safe delivery, and he could only excuse himself for the loss by showing that it had been occasioned by the act of God, or of the king's enemies. It imposed on inn-keepers "a responsibility nearly commensurable with that of common carriers;" they were made prima facie liable for all articles "confided, expressly or impliedly, to their custody and care," but the grounds upon which they might defend were not so limited as in the case of the carrier. (Weisenger v. Taylor, 1 Bush, 276.)

But in dealing with carriers of passengers these rigid rules have never been extended beyond the baggage expressly intrusted to their custody. The rights, duties and liabilities of the passenger and carrier by land were well settled before the introduction of sleeping cars. The carrier became the insurer of all baggage received by him, and was bound to deliver it safely at its destination unless prevented by the act of God or the public enemy. But as to such articles as the passenger retained about his person or in his possession, if they were lost or injured, the carrier was not responsible therefor unless occasioned by his negligence; and this rule was even extended to such paraphernalia as the passenger could not reasonably be expected to part with during his journey. Whether the pas-

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senger remained awake or slept in his seat the carrier was under no obligation to guard him against theft from his fellow travelers.

But as to carriers of passengers by water, where they had paid for the privilege of occupying state-rooms, in which they were invited to sleep, the duties and liabilities of the respective parties do not seem to have been so definitely determined. In some courts it has been held that a steamboat company was liable to the occupant of a state-room, in the absence of negligence or fraud on his part, for the value of articles properly worn about his person, if stolen while he was asleep at night. But the opinion expressed by Chief Justice Gray, in Clark v. Burns, 118 Mass., 275, seems to accord with the weight of authority. The court there say: "The defendants, as owners of steamboats carrying passengers and goods for hire, were not inn-keepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might perhaps be so liable for the watch of a passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers." The distinguished jurist cites a number of authorities in support of this position, among them Steamboat Crystal Palace v. Vanderpool, 16 B. M., 302. In that case Vanderpool, having been robbed of a watch, diamond pin and a sum of money, sued the owners of the boat for their value. On the night of the larceny he communicated to a servant of the boat the fact that the lock on the door of his state-room was out of order, and could not be fastened. The servant instructed him to place a chair and his baggage against the door, which he did. The articles in question were worn and carried on the person of the plaintiff, and on retiring they were placed on a chair and a shirt thrown over them. On the following morning they were discovered to have been stolen during the night. The court

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say: "Steamboats are in some respects analogous to inns, and it would greatly promote the ease, comfort and safety of the traveling community if their owners were held responsible to the same extent that inn-keepers are; but, so far as we know, they have never been held accountable upon the principles applicable to inn-keepers, and we suppose that thousands of instances have occurred on steamboats of depredations like the one perpetrated on the plaintiff, and yet we have heard of no case in which the principles of law governing inn-keepers have been extended to steamboat owners. * * * Steamboat owners are regarded as common carriers, and are subject to the well established principles governing their responsibilities; and we are not aware of any principles by which common carriers can be held responsible for the wearing apparel of the passenger or his money which he carries upon his person, and which is under his own immediate care and control. When such things are made baggage, and delivered to the owners or their agents, the rule is different, and their responsibility is regulated by the established rules in reference to the baggage of passengers."

It would be difficult to give any valid reason why a sleeping car company should be held to any more rigid liability in such cases than a steamboat company. It could no more be said that a sleeping car was an "inn on wheels" than that a steamboat was an inn on water. They both provide sleeping apartments for passengers, who pay for the privilege, and are expected to occupy them. Sleep is as essential to the health and comfort of the traveler in the one case as in the other. The servants of the steamboat company certainly have the implied custody of the passenger's wearing apparrel to as great an extent as the servants of the sleeping car company. The resemblance of a steamboat to an inn is even greater than that of the sleeping car, since it is customary for the former to provide meals for its passengers. If, then, the rigid liability of inn-keepers is not to be extended to the owners of steamboats, common justice demands that it be not applied to the owners of sleeping cars. And we find this rule has been followed so

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far as the responsibilites of the latter have been the subject of judicial inquiry. While these adjudications are not placed upon the same ground, their conclusions are substantially the same. We can not concur in some of the reasons assigned in the various opinions, but we think their decisions are in the main correct.

In Plum v. Pullman Sleeping Car Co., 3 Cen. Law Journal, 592, the United States Circuit Court in Tennessee, Judge Brown presiding, held that the company was not liable, either as an inn-keeper or a common carrier, for money stolen from a passenger's pocket; but at the same time the court discussed what was considered the true relations between the company and its passengers, and held that the former was bound to keep a watch during the night to exclude unauthorized persons from the car, and "must take reasonable care of their guests and property, especially while said guests are asleep."

In Palmeter v. Wagner, discussed in 11 Albany Law Journal, 149, the Marine Court of New York held that sleeping car companies were not insurers, inn-keepers, nor transporters, nevertheless they must, by a reasonable watch, protect a passenger and the property about his person during sleep.

In Welsh v. Pullman Palace Car Co., 16 Abb. Pr. N. S., 252, it was held that the defendant was not responsible for an overcoat which the plaintiff, upon going to sleep, had hung in the berth above him. The court say: "The traveler voluntarily, and not of necessity, availed himself of what was placed before him for his comfort, and he can not cast the burden of care and diligence upon the defendant, neither is it right or just that the law should do so." We think the learned court has gone too far in this case in exonerating such companies. They assume that "the most discreet and vigilant officers of a car can not prevent depredations," and conclude that no duty attaches to the company in respect to the articles taken into the car by the passenger. They place the passenger upon the sleeping car upon precisely the same footing as a passenger upon any other coach attached to the train. In this we think

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the court has gone too far; nor did the facts of that case require this extreme view.

The Supreme Court of Illinois, in Pullman Palace Car Co. v. Smith, 73 Ills., 360, has considered this question. There Smith sued the company to recover $1,180. The court instructed the jury that if they believed from the evidence that the plaintiff had been robbed while traveling on the defendant's car they should find for him the amount lost, provided it did not exceed what would be a reasonable sum for him to carry on the journey he was taking. The verdict was for $277 in plaintiff's favor. The court say: "The instruction which the court gave to the jury made the company responsible as insurer for the safety of the money, imposing upon it the severe liability of an inn-keeper or common carrier. * * It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his person. The exposure to the hazard of liability for losses through collision, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe keeping by himself, and we think his must be the responsibility of its loss." Here again the court, finding that the defendant did not come within the ancient definition of a common carrier of goods, nor the Blackstonian definition of an inn-keeper, reversed the judgment against the company, and in doing so used language that would indicate the company was not to be held liable for such losses under any circumstances. As to whether the defendant, although not in fact an inn-keeper or common carrier of goods, undertook the performance of any duty in assuming its peculiar relations with the plaintiff, which would require it to watch over the plaintiff and his goods, was not discussed.

But it seems to us that the Supreme Court of Indiana, in the case of Woodruff, S. & P. C. Co. v. Diehl, 84 Ind., 474, has more accurately defined the duties and liabilities of the parties

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under such circumstances. There the plaintiff had lost his pocket money, watch, chain and locket. The petition alleged that "the appellant and its servants so carelessly and negligently conducted and behaved themselves in not keeping proper care and watch, and in not furnishing sleeping places which could be securely fastened, and in being otherwise careless and negligent, that by and through the said carelessness, negligence and default of the appellant and its servants in that behalf" the said property was lost. The special finding of the lower court was "that the plaintiff's loss was occasioned by the negligence of the defendant in failing to keep a sufficient watch during the night, and to take reasonable care to prevent thefts, and that the plaintiff was without fault. Upon this ground a judgment in the plaintiff's favor for the value of the articles was affirmed.

While, therefore, the stringent liability of an inn-keeper, which the distinguished Chief Justice Coleridge has said does not "stand on mere reason, but on custom, growing out of a state of society no longer existing," is not to be applied to the owners of sleeping cars, it does not follow that they assume no duties or liabilities. These cars are in themselves an invitation to the traveling public to enter and protect themselves against the weariness of a long journey by disrobing and sleeping.

The passenger in buying and the company in selling the ticket contemplate that this privilege will be improved. The company accepting compensation under these circumstances impliedly undertakes to keep a reasonable watch over the passenger and his property. The faithful performance of this undertaking is the limit of its duty in this respect. Its breach must be the formulation of every action seeking to charge the company with the loss of articles the passenger has taken with him upon the car.

In the case at bar the defendant was held liable without regard to the faithfulness of its servants. If they exercise proper care by keeping a reasonable watch over the plaintiff's property, there was no breach of any undertaking on the part of the company, and hence no liability.

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For this reason the judgment is reversed and the cause remanded, with directions to sustain the demurrer.

Sterling B. Toney for appellant.

Temple Bodley for appellee.

NEW BOOKS.

Desty on Taxation—The American Law of Taxation as determined in the courts of last resort in the U. S. By Robert Desty. Vol. II, St. Paul, West Publishing Co., 1884.

This volume completes the work. Mr. Desty's idea of a law book is an excellent one—to state the law just as he finds it without discussing it or filling up the text with his individual opinion. This is the only kind of book now useful to the practitioner. There are 10,000 cases treated of in these volumes. The index is full, but we think it had better have been placed all at the end of the last volume instead of divided between the two.

NOTES.

It is proposed in Chicago to change the hour for jury trials so as to have them commenced at 1 o'clock instead of 9 as heretofore. By this arrangement the juror would not be taken away from his business during the best part of the day. The court might occupy the interim from 9 to 1 in hearing equity cases, motions, arguments on instructions and such matters.

In Loog v. Bean, 26 Ch. Div., 306, the English Court of Appeal was asked to issue an injunction to compel defendant to hold his tongue. The compliant set out that he had been in the employ of plaintiffs, and, having been discharged by them, was circulating slanders among plaintiff's customers. The writ was granted.

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Some people are not endowed with the faculty of seeing a joke. Lord Morpeth used to tell of a Scotch friend of his who, to the remark that some people could not feel a jest unless it was fired at them with a cannon, replied: "Weel, but hoo can ye fire a jest out of a cannon, mon!"

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Alimony—

1. Maintenance—Pendente lite—Before fixing the amount the court should hear such proof as will best aid in determining the allowance unless the admissions contained in the pleadings will obviate this necessity. The mere fact that the wife's personalty of a certain value came into the husband's possession during the period they were living together is not a sufficient basis upon which to enable the court to make the allowance. The pecuniary, social and physicial condition of the parties at the time must control the action of the chancellor. Barrett v. Barrett. October 1, 1884. Martin Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. John W. Hampton for appellant; J. S. Patton for appellee.

Appeals—

1. Limitation—Death—The death of a party in whose favor judgment has been rendered does not serve to extend the time within which an appeal may be granted, as the statute which limits the time to two years within which an appeal may be granted contains no exception extending the time on that account. Moreover, the death of the plaintiff in the judgment does not prevent or obstruct the granting of an appeal, although no personal representative has qualified. Reeves v. Davis' Adm'r. October 1, 1884. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., dis. W. H. Cord and Hargis & Caldwell for appellant; J. S. & J. H. Power and E. W. Hines for appellee.
2. Affirmance as delay case—If the appellee wishes to file the transcript in order to move for an affirmance as a delay case he must file all of it; he can not select part of it, and thereby preclude the appellant from having it all considered. Tracey v. Symmes. October 8, 1884. Jeff. Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., overruling mo. to aff. as delay case. Chenault & Colston for appellant; F. T. Fox, jr., for appellee.
3. Final order—An order sustaining a demurrer to an indictment and again referring the charges to the grand jury is not such a final order as will support an appeal. To entitle the Commonwealth to an appeal there must have been a final disposition of the prosecution in the circuit

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court. Commonwealth v. Thomason. October 15, 1884. Fulton Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. C. H. Thomas for appellant; Tyler & Tyler for appellee.

4. Misdemeanors—A judgment on a verdict of acquittal in a misdemeanor case, where the offense is punishable by imprisonment, can not be reversed, and there is no statute, as in regard to felony cases, authorizing the Commonwealth's attorney to prosecute an appeal for the purpose of settling questions of law. Commonwealth v. Woodall. October 15, 1884. Fulton Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. C. H. Thomas for appellant; Tyler & Tyler for appellee.

5. The assignee in bankruptcy of the defendant, although not made a party to the action until after the judgment of sale, is entitled to appeal for creditors and to complain of errors in the sale. Bristow v. Peters, &c. October 4, 1884. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Holt, J., not sitting. J. J. Cornelison for appellant; B. J. Peters and John Elliott for appellees.

6. An appeal lies from an order of the circuit court refusing to allow a claim against the Commonwealth. Sparks v. Commonwealth. October 1, 1884. Johnson Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. F. Stewart for appellant.

Assignment of Error—See Exceptions, 2.

Assignor and Assignee—

1. Mortgage to secure guaranty of assignor. The assignor of a note contemporaneous with its assignment executed to the assignee a mortgage "the better to secure the payment of said note."

Held—That the language of the mortgage imports a contract of guaranty that the note will be paid by the maker, and the mortgage was given to secure this guaranty and not the implied liability of the assignor. The contract of guarranty was assignable so as to vest the equitable right thereto in the assignees, and the assignment thereof carried with it the mortgage lien. Therefore, the failure of the assignee to use such diligence against the maker as was required to enable him to recover upon the implied liability of the assignor does not prevent a recovery upon the contract of guaranty or the enforcement of the mortgage lien.

2. The rights of the parties are to be determined as if the stipulations of the mortgage had been written over the signature of the assignor on the back of the note, as the contract, though evidenced by different papers, is one contract, and must all be considered together.

3. Parties to action—The appellee having joined as co-plaintiff's the prior assignees, and being compelled, on motion of appellants, to strike their names from the petition, appellants can not complain that the prior assignees were not parties.

4. Interest—Appellee's cause of action accrued upon the failure of the payer to pay the note at maturity, and he was entitled to interest on the

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sum then due at 6 per cent. For the error in allowing interest after that date at 8 per cent., the rate contracted for in the note and then lawful, the judgment is reversed. Wheeler, &c. v. Glenn. October 15, 1884. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Elliott & Hemingray for appellants; Russell & Helm and Helm Bruce for appellee.

5. Where an assignee holds notes maturing at different times he must, in order to preserve his recourse on the assignor, pursue his remedies on each note as it matures. If all are secured by lien, and he has the property sold which was in lien and it does not sell for enough to pay the debts in full, he can not appropriate the money arising from the sale to satisfy any of the debts as to which the recourse may be lost, but must first apply it to the debts as to which there is recourse, and he can only recover from his assignor such part of the consideration paid for the assignment as is left after such application. Towsend & Massie v. Dittoe. October 22, 1884. Ohio Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Towsend & Massie and W. N. Sweeney & Sons for appellants; G. W. Ray and A. Duvall for appellee.

Attorneys—See Pleadings, &c., in Criminal Cases. 4—

1. An attorney who accepts for collection an assigned note is liable to his client for failing to use the diligence necessary to preserve the assignee's recourse upon the assignor. Towsend & Massie v. Dittoe. October 22, 1884. Ohio Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Towsend & Massie and W. N. Sweeney & Sons for appellants; G. W. Ray and A. Duvall for appellee.

Champerty—

1. Although a vendee in possession, who has performed his part of the contract, holds a perfect equitable title, leaving in his vendor no right whatever as against him but only the naked legal title and the duty to convey it, a deed by the vendor to a third party is not champertous, and an action may be maintained on the warranty therein. The tendency of adjudged cases is to restrict, rather than to enlarge, the operation of the champerty law. Akers v. Percifull's Adm'r. October 1, 1884. Hardin Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wilson & Hobson for appellant; Montgomery & Poston for appellee.

Churches—

1. Property rights—Under the General Statutes when there is a schism in a church, the excommunication of one party by the other does not impair the right of the former to the use of the church and appurtenances for divine worship, unless the excommunication be "on the ground of immorality," the mere refusal of a minority to obey the wishes of the majority, or to subscribe to every view the majority may express as to their religious convictions, does not amount to "immorality." To have that effect the conduct must be such as "amounts to dishonesty, wickedness, injustice—such action as contravenes the moral or divine law."

There was a division in a Baptist church, growing out of the refusal of a majority of the members to allow a certain minister to preach oc-

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casionally in the church and administered baptism, and a council was called from other churches to determine the matters at issue. The refusal of the minority to abide by the decision of the council resulted in their expulsion, and the expelled members insisting on their right to use the church, the majority brought this action, asking that their title be quieted and the defendants enjoined from the use of the church property.

Held—That these facts bring the case within the statute, and that the expulsion of the defendants does not impair their right to the use of the church property for such a part of the time as the statute provides.

2. Although the church was organized and its property conveyed to it while the act of 1814, determining the right to the use of church property in such cases, was in force, yet as the trustees who then held the title for the church died, and it was without any organization until it was finally re-organized by the appointment of new trustees long after the adoption of the Revised Statutes, the provisions of which were the same as those of the General Statutes, the General Statutes, and not the act of 1814, must govern.
3. The courts will not assume to determine whether there has been a valid expulsion of members of a church in accordance with the rules governing the church. The organic law of the church must control in all such matters. It is only when the church undertakes to invade the property rights of its members, and to exclude them from the use of the church property, that the courts will interfere. Ransom, &c. v. Rogers, &c. October 2, 1884. Boone Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. A. G. Winston and O'Hara & Bryan for appellants; Pryor & Chambers for appellees.

Common Carriers—

1. Special contract—Common carriers may limit their common law liability by special contracts, but can not, by such contracts, protect themselves against the consequences of their own negligence.
2. Liability to consignee—Ordinarily the carrier's liability is to the consignee, yet the shipper is his agent in making the contract, and it is sufficient for the carrier to prove a special contract with the shipper. This may be done by showing that the shipper has voluntarily accepted a bill of lading containing the stipulation in question. Adams Express Co. v. Marshall. October 22, 1884. Bracken Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. M. F. Wilson, E. H. Kilpatrick and Hallam & Myers for appellant; A. Duvall for appellee.

Constitutional Law—

1. Peddler's license—The legislature has no power to impose burdens upon citizens of other States that are not imposed upon citizens of its own State, or upon goods manufactured in other States that are not laid upon goods manufactured in its own State.

The legislature having, by an act approved February 21, 1874, provided "that itinerant persons who are citizens of this State and who vend ex-

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clusively goods, wares and merchandise which are the growth, product or manufacture of this State, shall not be deemed peddlers, nor required to take out license," and to that extent modified the General Statutes, which declared all itinerant persons vending goods, wares, etc., to be peddlers, and required them to procure a license, that act must be construed as repealing in toto the provisions of the General Statutes requiring peddlers to procure a license, as to exempt the citizens and products of this State operates as an exemption of the citizens and products of all States. Rash v. Holloway. October 22, 1884. Henderson Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Thomas E. & E. C. Ward for appellant; R. H. Cunningham for appellee.

Corporations—

1. Organizations under General Statutes—In order to organize a corporation under chapter 56 of the General Statutes, the notice required by section 5 of that chapter must be published at least four weeks, a publication for a shorter time will not suffice, and a compliance with this provision of the statute is a condition precedent to the validity of the acts of such a corporation.
2. Where the attempt to organize the corporation is abortive by reason of the failure to make the publication, the members of the association are individually liable to the creditors. Bamberger, Bloom & Co. v. White &c. Carter Bros. & Co. v. Same. McClung, Day & Riley v. Same. October 29, 1884. Caldwell Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. F. W. Darby for appellants; Geo. W. Duvall and Wm. Marble for appellees.
3. Liability to indictment—A corporation can be indicted or punished for causing a public nuisance, for not performing a duty cast upon it by law, or for the doing of an unlawful act where the intention is not an ingredient necessary to constitute the offense.
4. Failure of city to abate nuisance—A municipal corporation can not be held liable for nonfeasance unless it has power, and it is its duty, to prevent the act through its ministerial officers.

   The appellee can not be punished for permitting a nuisance, in that it did not prevent a "bawdy house" from being kept and did not punish the keeper and those who assembled there, as it is not made the duty of appellee to abate nuisances, except such as are defined by it, and it does not appear that the acts permitted by appellee have been defined by it to be a nuisance. Commonwealth v. City of Paducah. October 29, 1884. McCracken Ct. Ct. Opin. by Ward, P. J., Sup. Ct., aff. C. H. Thomas and P. W. Hardin for appellant; E. W. Bagby for appellee.

Costs—

1. Appellant and appellees were both claiming to be lien holders as to a fund in court, and the court having held that the lien of appellees was prior to that of appellant, appellant appealed, and pending the appeal an agreement was entered of record that the cost of two copies of the record, for the use of the court and counsel upon the appeal, should be paid out

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of the fund in controversy, it being agreed "that the unsuccessful litigants pay for both records in like manner as they would be bound to do for a single copy." The judgment was affirmed as to the appellees to this appeal in all respects, and reversed as to the appellant, because of the failure of the lower court to allow him a certain claim against the fund in controversy, which did not affect these appellees, their lien being prior.

Held, That appellant was the unsuccessful litigant within the meaning of the agreement, and must pay for both copies of the record. Miller v. Mount Savage Furnace Co., &c. October 18, 1884. Lou. Ch. Ct. Opin. by Holt, J., Ct. Ap., aff. John R. M. Polk for appellant; R. H. Blain and Barret & Brown for appellees.

2. Unless the succesful party to an appeal has paid the clerk for a copy of the records, or is liable for the cost of a copy, the cost of the copy can not be taxed as a part of the cost and included in the execution against the unsuccessful party. A mere agreement by a party that the cost of a copy may be taxed as a part of the cost in the event he is successful is not sufficient to authorize the clerk to tax it. McCormick Harvesting Machine Co. v. Ripley. October 29, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct. Sust. Mo. by appellant to quash execution. N. T. Crutchfield for appellant; John Stites for appellee.

Devise—

1. Defeasible fee—A testator, after devising land to each of his children, provided that "if any of my children should die without heirs the property received by him or her shall be equally divided with the remaining children."

Held, That the first takers took each a defeasible fee, but upon the death of one of them without children the survivors took an absolute estate in the interest of the deceased brother or sister.

2. A defeasible fee ought not to be created by implication. Bryant v. Bryant's Ex'or. October 80, 1884. Fayette Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Tanner & Sharp for appellant.

Dower—

1. Laches of doweress—Appellant having stood by and allowed judgment to be rendered for the sale of the property in which she now asserts her claim to dower, and allowed the property to be sold, can not disturb the purchasers for no other reason than that the chancellor has sold the productive property and left her with that which is unproductive, she having received one-third in value of the entire real estate. Keegan v. McAtee. October 9, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. Rodman & Brown for appellant; Muir & Heyman for appellee.

2. Sale under execution—The fact that dower has not been assigned does not, under the statute, protect it from sale under execution. Funk v. Walter. October 9, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. Thomas B. Fairleigh for appellant; Kohn & Barker for appellee.

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Evidence—See Pleading, &c., in Crim. Cases, 4; Wills—

1. Res Gestæ—While the statements or conduct of an agent during the performance of a tort are imputable to the principal as part of the res gestæ, whenever the tort itself is so imputable, upon the trial of an action by appellant against appellee for willful negligence resulting in the death of appellant's intestate, who was at the time a passenger upon one of appellee's boats, the statements of the mate and second clerk of the boat, made many days after the accident, as to how it occurred, were properly excluded, and the fact that the statements were made in response to inquiries by the plaintiff as to the whereabouts of her husband does not alter the rule. Hank's Adm'r v. Louisville & Cincinnati Mail Line Co. October 11, 1884. Jeff. Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., aff. Marc Mundy for appellant; Hamilton Pope for appellee.

Exceptions—

1. To commissioner's report—When an amount reported by a commissioner is made up of numerous smaller sums, an exception should point out the particular sum which it is supposed the commissioner should not have allowed.
2. Assignments of error complaining of the action of the commissioner, and not of the court, can not be considered. Eubanks, &c. v. Vance. October 29, 1884. Simpson Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Milliken & Bush for appellants; Geo. C. Harris and J. T. Montgomery for appellee.

Executions—

1. Sufficiency of levy—An execution levy upon land is sufficient although it fails to state that the land lies in the county to the sheriff of which the execution is directed; that is to be presumed.
2. A levy upon 90 acres of land as part of a tract of 412 acres conveyed by G to the defendant, giving the book and page where the deed is recorded, is held in this case to be sufficient.
3. Liability of sheriff—The appellee being the plaintiff in certain executions which had been levied upon the land of the execution defendant, who, subsequent to the levies, had been adjudged a bankrupt, filed his petition in the bankrupt court asking that court to sell, by its decree, the land on which he held his lien, and to order the proceeds to be first applied to the payment of his execution debts. The levies were adjudged by the bankrupt court to be void because of uncertainty, and the appellee was permitted to share in the proceeds of the land as a general creditor only. The appellee then brought this suit against appellants, sureties on the sheriff's official bond, to recover the amount of the executions, on account of the sheriff's failure to properly levy them.

   Held—That as the levies were in fact valid, although the bankrupt court erroneously decided otherwise, and the property was sufficient in value, the sheriff, by reason of his statutory right to have the judgments assigned to him, stood secured against any liability he might have incurred by reason of any default of his concerning the executions, and

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appellee having taken the matter out of his hands by invoking the judicial power of the bankrupt court to have the land sold, and thus deprived him of his statutory security, can not now be permitted to visit on appellants the disastrous consequence of an erroneous decision which he procured to be rendered. Galloway, &c. v. Soaper. October 8, 1884. Henderson Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Yeaman & Lockett for appellants; Montgomery Merritt for appellee.

4. Suit in equity to sell land levied on—Where an execution has been levied upon land subject to a prior lien, the plaintiff is not obliged to enforce his levy by an execution sale, but may resort to a suit in equity, as only a lien would be acquired by the execution sale, and a resort to a court of equity would finally be necessary.

5. Where there are conflicting claims to land upon which an execution has been levied, the plaintiff may, before sale, bring a suit in equity to settle the rights of the claimants. Crume, &c. v. Spaulding, Carothers & Co., &c. September 30, 1884. Nelson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Lewis, J., dissenting. J. C. Wickliffe for appellants; Muir & Wickliffe for appellees.

Franchises—

1. A privilege in which the public have an interest, and which can not be exercised without authority from the sovereign power, is a franchise. Cumberland River Lumber Co. v. Commonwealth. October 8, 1884. Whitley Cir. Ct. Opin. by Bowden, J., Sup. Ct., trans. to Ct. of Ap. Wm. Lindsay for appellant.

Fraud—

1. Inadequacy of consideration—The fact that the price paid for an interest in certain claims was far below the amount of the interest sold does not prove unfairness, as their value rested very much on opinion, litigation being anticipated and the claims having been offered at a heavy discount and not sold. Cain v. Hahn. October 15, 1884. Lou. Ch. Ct. Opin. by Bowden, J., Sup. Ct., rev. Clay & Jackson for appellant; Samuel B. Richardson for appellee.

Fraudulent Conveyances—

1. A judgment for the defendants in an action to have a conveyance declared to operate as an assignment under the act of 1856 is not a bar to an action to set aside the same conveyance as fraudulent. Cline v. Smith, &c. October 30, 1884. Pike Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. R. T. Burns for appellant; L. T. Moore for appellees.

Guardian and Ward—See Judgment, 2—

1. Suit by guardian—Limitation—The guardian is only authorized to sue in his own name when a recovery is sought upon a contract made with him as guardian. When he sues to recover the property of his ward the suit must be in the name of the infant by the guardian or next friend;

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the statute, therefore, does not begin to run in favor of the surety of an executor or administrator against the devisee or distributee when the guardian is appointed, but when the devisee or distributee arrives at full age. Wilson, &c. v. Hodges' Gd'n. October 15, 1884. Bath Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Reid & Stone for appellants; J. A. Turner and J. J. Nesbitt for appellee.

2. Maintenance of ward—Where the ward lived with his mother on a small farm, which he cultivated for her, and his services were worth more than his board and clothes, it was not proper for the guardian to pay his board, and the guardian is not entitled to credit therefor. Dawson v. Mann. October 15, 1884. Hart Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Julian & Martin for appellant; D. W. Lindsey for appellee.

Heirs—

1. Suit by heir—The heir can not sue to recover the unadministered personal estate of his ancestor unless the administrator has failed or refused to sue; in that event the heir may sue the debtor and the administrator, showing the neglect and refusal of the latter to sue.
2. Suit against heir—It is generally improper to sue the heir for the debt of the decedent without joining the administrator; but there are exceptions to the rule, as where there has been no administrator, or where the administrator, having been sued, has died pending the action, and, there being no administrator de bonis non, the action is revived against the heir at law. Wilson, &c. v. Hodges' Gd'n. October 15, 1884. Bath Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Reid & Stone for appellants; J. A. Turner and J. J. Nesbitt for appellee.

Homestead—See Judicial Sale, 1—

1. Renewal of note given prior to homestead act—The renewal of a note given before the passage of the homestead exemption act of June, 1866, is not a satisfaction of the original debt, but only a change of the evidence of it, and no homestead is exempted as against the renewal note. The fact that the original note was executed by a firm, and the renewal executed by a single member of that firm originally bound for the debts, does not lessen the liability of the obligor in the renewal note, or exempt his homestead before subject. Miller v. Clemmons. October 2, 1884. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. J. W. Thomas, Wathen, Wickliffe & Wickliffe for appellant; Nat W. Halstead for appellee.
2. The waiver by a debtor of his right to a homestead as to one creditor does not amount to a waiver as to any other creditor, and the property embracing the homestead having been sold by reason of its being indivisible, the debtor is entitled to the surplus, not exceeding $1,000, after satisfying the lien, to enable him to purchase another homestead. This fund can not be seized by a creditor before it reaches the hand of the debtor, and an assignment or transfer of the fund by the debtor in good

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faith for value will pass the right to the assignee as against a creditor whose attachment may be prior in date.

3. Neither the homestead nor its proceeds is an estate for life, nor can either be encumbered by liens unless those liens have been created by the debtor in the mode pointed out by the statute. It is only where the owner of the homestead dies and it passes to his wife and children that the creditor of the debtor may subject it, subject to its occupancy by the family. Schmidt v. Oliges, &c. October 4, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. Richards & Baskin for appellant; P. A. Gaertner for appellees.
4. Where a widow and infant children were living together and occupying the home place of the deceased husband and father at the date of the passage of the homstead law, dower not having been assigned, the widow became entitled to the homestead for herself and children just as if the descent had been cast after the passage of the homestead law.
5. The widow has the right to elect whether she will claim homestead or dower, but she can not claim both. Funk v. Walters. October 9, 1884. Lou. Ch. Ct. Opinion by Pryor, J., Ct. Ap., rev. Thomas B. Fairleigh for appellant; Kohn & Barker for appellee.

Husband and Wife—

1. The wife of the plaintiff having filed an amended petition in her name, alleging that her husband had deserted her, and asking that she might be allowed to prosecute the action in her name for her husband, an order simply providing that she might prosecute the action for him was a substantial compliance with subsection 4 of section 34 of the Civil Code, although the order did not provide that the prosecution should be in the wife's name. Harris v. Lavin, &c. October 21, 1884. Floyd Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. R. H. Weddington and James Gobel for appellant; W. C. Ireland and W. S. Haskins for appellees.
2. Wife's equity to settlement—In an action by husband and wife upon a note for $200 executed to the wife for borrowed money, the defendant attempting to set off a debt due him from the husband, the lower court properly recognized the wife's equity to a settlement of the whole amount, it appearing that the husband had not had any sort of possession of the money loaned, which was the proceeds of land owned by the wife; that the note was held by the husband for her and not as his own; that he had very little property, the evidence tending to show that he was insolvent; that the wife had no estate except the note in controversy, and that of her five children the oldest was not over nine years of age. Meyler v. Maraman, &c. October 15, 1884. Bullitt Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. R. G. Meyler for appellant; W. R. Thompson for appellee.
3. Release by husband of mortgage executed to wife—In an action brought by husband and wife to foreclose a mortgage executed to the wife, there being nothing to show that the mortgaged debt was the separate estate of the wife, the husband had a right to release the mortgage and dismiss

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the suit. Graves v. King, &c. October 28, 1884. Henderson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Montgomery & Merritt for appellant; H. F. Turner for appellees.

4. Proceeds of wife's land—A note executed to husband and wife for the purchase price of the wife's land can not be reached by an attaching creditor of the husband unless it was provided in the conveyance or the obligation of purchase that the proceeds of the land should not belong to the wife. The fact that the note was made payable to the husband and wife does not show a provision that it was to be the husband's. Rousseau, &c. v. Flower's Adm'r. October 8, 1884. Russell Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. J. E. Hays for appellant.

Injunctions—

1. Jurisdiction—An action to enjoin an officer from selling under execution property claimed to be exempt is not an action to stay proceedings on a judgment, and need not, therefore, be brought in the court in which the judgment was rendered. (Ward, P. J., and Bowden, J., concur in this proposition.)
2. To prevent sale under execution—An officer can not be enjoined from selling under execution property claimed to be exempt unless the remedy at law is inadequate.
3. Trespass—An injunction will not be granted to restrain a trespass unless the trespasser is insolvent or the injury irreparable. C., O. & S. W. R. R. Co. v. Reasor, &c. October 15, 1884. Meade Cir. Ct. Resp. by Ward, P. J., to pet. for reh'g, Bowden, J., dissenting. (See opinion, 5 Ky. Law Rep., 931.)

Dissenting opinion by Bowden, J.

1. The allegation of the plaintiff's petition that the property levied on is necessary for the prosecution of its business as a common carrier, and that a sale of the property would close the station where it is used "and stop the transaction of plaintiff's business with the public as a common carrier at said station," is sufficient to authorize an injunction to prevent a sale of the property.
2. The fact that the property levied on had been mortgaged to trustees for creditors before the levy was made was sufficient to authorize the injunction, as it left the defendant in the execution with only an equitable interest. When asked to protect a legal interest the chancellor will inquire if the redress at law is adequate, but when asked to protect a purely equitable interest the question can not arise. H. Cummins and P. H. Darby for appellant; C. C. Fairleigh for appellee.

Inn-keepers—

1. The liability of inn-keepers is now just as it was at the common law, except to the extent they are relieved from responsibility by a compliance with the act of February 5, 1874; the guest, therefore, is not guilty of contributory negligence in failing to deposit his valuables with the inn-

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keeper unless the latter has complied with that act and given the notice therein required. McClay v. Nash. October 8, 1884. Jeff. Ct. Com. Pleas. Opin. by Ward, P. J., Sup. Ct., aff. Elliott & Hemingray for appellant; Kohn & Barker for appellee.

Insurance—See Purchasers, 2.

Interest—

1. Under the conventional interest law, after the death of the obligor in a contract for the loan of money at a higher rate of interest than six per cent., the contract, after maturity bears only six per cent., and when, after the death of one of several obligors in such contract, a payment is made, no matter by whom, in so far as it affects the estate of the decedent, it first satisfies the interest his estate is bound to pay, to wit, six per cent., and the balance goes to extinguish the principal; in so far as it affects the other obligors it first satisfies the interest they are bound to pay, to wit, ten per cent., and then goes to the extinguishment of the principal. The law appropriating partial payments appropriates them so as to satisfy the obligations of all parties to the paper. Snelling's Adm'r v. Atchison. October 22, 1884. Bath Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. R. Gudgell & Son and A. Duvall for appellant; H. L. Stone for appellee.

Judgment—See Pleading, &c., in Crim. Cases, 2—

1. Restitution of money paid on judgment subsequently reversed—Money paid upon an erroneous judgment may, after the reversal of the judgment, be collected by rule upon the party to whom it was paid. To this rule any legal or equitable defenses occurring after judgment may be made, and where one received the money in a fiduciary capacity he may show that he has paid it to the persons designated.
2. Where a guardian has collected a judgment in his favor as guardian and the judgment is subsequently reversed, in order to escape payment, he must show that he has expended the money in good faith for the benefit of his ward, and in a way in which he had the right and in which it was his duty to expend it. A response to a rule against him that he, "in good faith," expended the money for the benefit of his ward is not sufficient, being merely a conclusion of law. He must allege facts showing that he has expended the money in good faith. If the guardian has in his hands or under his control other estate of the infant, he must use that before using the money wrongfully collected on the judgment. Humphrey v. Hughes' Gd'n. October 22, 1884. Nelson Cir. Ct. Opinion by Ward, P. J., Sup. Ct., rev. Muir & Wickliffe for appellant; J. C. & J. A. Wickliffe for appellee.
3. Appellant having executed a bond to perform the judgment of the court, and thereby discharge the attachment of the fund in the hands of the railroad company and created a personal liability upon himself, a personal judgment against him for the pro rata sum allowed the appellee out of the attached fund was properly rendered. Graham v. Sheets.

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October 2, 1884. Kenton Ch. Ct. Opin. by Holt, J., Ct. Ap., aff. T. F. Hallam for appellant; James O'Hara and C. D. Foote for appellee.

4. Where a judgment in regular form is admitted in evidence, it can not be attacked by showing that the proceedings in the action in which it was rendered were irregular. Harris v. Lavin, &c. October 21, 1884. Floyd Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. R. H. Weddington and James Gobel for appellant; W. C. Ireland and W. S. Haskins for appellees.

Judicial Sales—

1. Premature sale—Where the property of a debtor is indivisible, and a sale has to be made to pay his indebtedness, a sale is not premature because made before the amount of the indebtedness has been ascertained or the debtor's right to a homestead determined.
2. Test of value of property—The value of property sold at judicial sale is not only determined by those appraising the property, but by the actual and active competition on the part of bidders who were wanting the property and able to make their bids good. Such circumstances in this case conducing to the conclusion that the property sold for more than two-thirds of its value, the court properly disregarded merely speculative opinions as to the value of the property on the motion to set aside the sale. Bristow v. Peters, &c. October 4, 1884. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Holt, J., not sitting. J. J. Cornelison for appellant; B. J. Peters and John Elliott for appellees.
3. Title relates to day of sale—While the title does not pass under a decretal sale of realty until it has been confirmed and the deed executed, the proceedings relate back to the date of sale, and the title passes to the property as it existed at the time. Neal, &c. v. City of Louisville. October 8, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. Dupuy & Twyman for appellants; T. L. Burnett for appellee.

Jurisdiction—

1. Waiver of right to object—A cause having been tried and judgment rendered in the District Court of the United States, it is too late to object that court had no jurisdiction because the jurisdiction of the State court had attached, the State court having consented to relinquish its jurisdiction without objection on the part of any of the parties in interest, and no objection being made in the United States Court to its jurisdiction. The judgment of that court is, therefore, conclusive as to the matters there litigated. Barney & Smith Mf'g Co. v. Hart, Rec'r. October 29, 1884. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. O'Hara & Bryan for appellants; W. J. Hendrick for appellee.

Justices of Peace—

1. Jurisdiction of justices—A justice of the peace has jurisdiction of the offense of keeping a tippling house, and the offense may be prosecuted by warrant.

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2. "Conclusion" of warrant—The provision of the Constitution that all prosecutions shall conclude "against the peace and dignity of the Commonwealth of Kentucky," was not intended to apply to prosecutions by warrant before a justice, but only to prosecutions by indictment.
3. Jurisdiction of county judge—Judges of county courts have the same jurisdiction in criminal cases as justices of the peace. Commonwealth v. Clark; Same v. Wornicutt. October 22, 1884. Rockcastle Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. P. W. Hardin for appellant; F. H. Reppert for appellees.

Limitations—

1. Disabilities—Adverse possession—Two of three joint devisees and the infant heirs of the third instituted this action in 1878 against appellants for the recovery of the land devised to them, of which appellant had had the actual adverse and continuous possession since 1858. All the devisees had for several years prior to 1858 been married women, and, except the one whose heirs are suing, who was still a married woman at the time of her death in 1872, are yet married women. Held—That the recovery by the plaintiffs is not barred. (Moore v. Calvert, &c., 6 Bush, 356.) Parker, &c. v. Smith, &c. October 11, 1884. Franklin Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. on original and rev. on cross appeal. Preston & Brown, John L. Scott and W. H. Sneed for appellants; Hord & Trabue for appellees.
2. Action by mortgagee to recover mortgaged property—An action by the mortgagee of personal property to recover the property, or its value, from one who purchased it from the mortgagor, is barred by the lapse of five years from the date at which the purchaser took possession of the property and converted it to his own use. Walker v. Chenning, Ex'or. October 8, 1884. Pendleton Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Carlisle, Goebel & Carlisle for appellant; Clark & Applegate for appellee.

Local Option Law—See Pleading, &c., in Crim. Cases, 10, 14.

Married Woman—

1. A married woman may mortgage her general estate to secure the debt of the husband.
2. The acknowledgment of a married woman to a deed or mortgage can not be invalidated by proving an alibi on her part. Birkhead v. Kyle, &c. October 25, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. E. S. Watts and Mix & Rogers for appellant; John Barret for appellees.

Mechanics' Lien—

1. Under the mechanics' lien law applicable to the city of Louisville the mechanic can assign his lien, but the assignee takes it subject to the same conditions upon which the original contractor held it, and a subcontractor, therefore, still has the right, at any time before the employer has paid the debt, to acquire a lien for himself by notice to the employer.
2. Neither the contractor nor subcontractor can acquire an enforceable lien for a less sum than $10.

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8. No lien attaches in favor of the subcontractor until he has given the required notice, and in an action by him to enforce his lien he must allege facts showing that the statute has been complied with in this respect. Mulliken v. Seiber, &c. October 8, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. Ward, P. J., dissenting. Bland Ballard and Alex. P. Humphrey for appellant; Elliott & Hemingray for appellees.

Negligence—

1. Willful neglect—While the rapid speed of a train at an ordinary crossing where the usual signal is given in time for travelers to have notice of its approach is not of itself willful neglect, yet as it appears in this case the train was approaching a dangerous crossing at the rate of thirty-five or forty miles an hour in the face of a storm of wind and rain that obstructed the vision as well as the hearing of those on or near the road, without any precaution other than a signal at the usual time and place, it can not be said that there is an entire absence of evidence showing willful neglect.
2. Evidence—The court properly refused to allow the defendant to prove that no one other than the plaintiff's intestate had been killed at the crossing where he lost his life, as this fact did not tend to refute the proof of willful neglect or contradict the testimony as to the dangerous condition of the crossing. L. & N. R. R. Co. v. Wallace's Adm'r. October 16, 1884. Simpson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. Lindsay for appellant; J. A. Mitchell and E. W. Hines for appellee.

New Trial—See Practice in Civ. Cases, 4—

1. Time for motion—The time within which a motion for a new trial may be made begins to run when the verdict or decision of fact is made, although no judgment upon the verdict has been entered. Special verdict returned January 30th, and judgment rendered thereon May 7th, a motion for a new trial entered May 8th was too late. Imperial Fire Ins. Co. v. Kiernan. Northern Ins. Co. v. Same. October 1, 1884. Jeff. Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. F. T. Fox, jr., for appellants; W. Lindsay and S. F. J. Trabue for appellee. Also Dear, &c. v. Warman. October 8, 1884.
2. New trial upon payment of cost—An order granting a new trial is void in so far as it requires the payment of all costs as a condition precedent, but is a valid order to the extent that under it the costs of the former trial may be required to be paid as a condition precedent to a new trial.
3. The court in granting a new trial, upon payment of costs, has no right to require the costs to be paid within a shorter time than forty days, the time allowed by the statute and the party to whom the new trial is granted still has forty days within which to pay the costs of the former trial, notwithstanding the fact that the order of the court may require the payment to be made within a shorter time. McClary v. Nash. Oct. 8, 1884. Jeff. Ct. Com. Pleas. Opin. by Ward, P. J., aff. Elliott & Hemingray for appellant; Kohn & Barker for appellee.

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5. Where parties against whom a judgment has been rendered commence proceedings for a new trial, whether by petition or by motion in the original action, and a new trial is awarded them, they thereby become parties to the original action, and the court has jurisdiction over their persons to enter such orders as the ends of justice may require.
6. A decree in an action for a new trial vacating such orders in the original action as were "prejudicial" to the petitioners for a new trial left in full force and effect all orders favorable to them, among which was a judgment dismissing the original action for want of prosecution. Therefore, after the decree vacating all "prejudicial" orders, the original action stood as if no steps had been taken therein after the judgment dismissing it, and without in some way abrogating that judgment the court had no authority to grant any relief to the plaintiff in that action. Sewell, &c. v. Combs. October 15, 1884. Breathitt Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. A. Duvall for appellants; I. N. Cardwell and J. L. Scott for appellee.

Nonresident—

1. Attorney for—Where the appellant has an attorney appointed to defend for the nonresident appellee, he can not escape the payment of an allowance to the attorney by showing that there was no necessity for the appointment, by reason of the fact that the nonresident had entered his appearance. Ryland v. Suire. October 15, 1884. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct. Adjudging resp. to rule insufficient. M. R. Lockhart for appellant; J. F. & C. H. Fisk for warning order attorney.

Partnership—

1. The property of a partnership belongs to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; consequently no greater interest can be derived from a voluntary sale of his interest by a partner, or by a sale of it under execution.
2. The legal value of such a sale involves the implication that the selling partner is not to be called on as a debtor to pay back what he has as partner withdrawn for his own use. The partner's individual account is not a debt due to the firm, but a matter to be adjusted in a settlement of firm business among the members, when all sums so withdrawn by other partners will also be considered. Eubank, &c. v. Vance. October 29, 1884. Simpson Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Milliken & Bush for appellant; Geo. C. Harris for appellee.
3. Failure to keep accounts—The appellant having applied to a court of equity asking a settlement of partnership accounts, and it appearing that by reason of the neglect of both the plaintiff and the defendants in failing to keep any accounts, it is impracticable to make any adjustment of the partnership matters, no judgment should be rendered in favor of either party but the petition should be dismissed, although it appears

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that if either party is entitled to judgment it is the appellant, plaintiff below. Bradford v. Wares' Ex'or, &c. October 23, 1884. Bracken Chy. Ct. Opin. by Pryor, J. Ct. Ap., rev. W. Lindsay and Jno. B. Clark for appellant; B. G. Willis and E. Whittaker for appellees.

Patents—

1. Correction of calls—While the law permits the correction of the calls of a patent by the plat and certificate of survey upon which it is based, this should only be done when clearly authorized by the testimony.
2. Exclusion—Where the patent upon which the plaintiff in an action of ejectment relies contains an undefined exclusion and the defendant has put in issue the plaintiff's title, it rests upon the plaintiff to show that the land he claims is not within the exclusion, but when he has shown this, if the defendant seeks to shelter under an older patent, which also contains an exclusion, then the burden is thrown upon him to show that his claim is not within the exclusion in his own patent. Harris v. Lavin, &c. October 21, 1884. Floyd Cir. Ct. Opin. by Holt. J., Ct. Ap., aff. R. H. Weddington and James Gobel for appellant; W. C. Ireland and W. S. Haskins for appellees.

Pension Money—

1. Exemption—The fact that land was purchased with money received by the owner as a pensioner of the United States does not exempt it from the payment of his debts. Pension money is exempt only until it reaches the hands of the pensioner. Hudspeth v. Harrison, &c. October 23, 1884. Taylor Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Russell & Russell for appellant; H. Robinson and W. B. Harrison for appellees.

Personal Representative—See Heirs, 1, 2.

Pleading—

1. Failure to traverse allegation of value—Subsection 4 of section 126 of the Code, relating to allegations concerning value or amount of damage, does not relate to a case where it is alleged that the defendant expressly agreed to pay the specified sum, but to cases where his liability is based on an express contract which binds him to pay some amount in case of a breach, and where the facts alleged by the pleader require the defendant to pay the sum claimed. McKinley's Ass'ee v. Barney, &c. October 8, 1884. Kenton Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Clark & Simon for appellant; O'Hara & Bryan for appellees.
2. Defects cured by verdict—Defects in a petition are cured by the verdict and judgment when the issue joined is such as necessarily requires on the trial proof of the facts imperfectly stated or omitted, and without which it is not to be presumed the judge would have directed the jury to give, or the jury would have given, the verdict. McDowell, &c. v. Linville, &c. October 1, 1884. Robertson Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. W. Buckler and O. S. Deming for appellants; W. W. Kimbrough, B. G. Willis and A. Duvall for appellees.

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Pleading and Practice in Crim. Cases—

1. Verdict returned in absence of defendant—The fact that appellant, who was found guilty of a felony, was absent from the court room when the verdict of the jury was returned and received by the court, having absconded after the jury retired to consider of their verdict, would afford no ground for reversal, even if the court had, under the Criminal Code, power to revise the alleged error of the lower court.
2. Delay in entering judgment—The fact that the verdict was returned in October, 1881, and judgment was not rendered until May, 1884, does not entitle appellant to a reversal, as judgment could not be rendered against him except in his presence, and he was not arrested and brought into court until the time at which judgment was rendered against him, although bench warrants were issued from time to time as provided by section 285 of the Criminal Code. Smith v. Commonwealth. September 4, 1884. Hardin Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. H. T. Wilson for appellant; P. W. Hardin for appellee.
3. Evidence—A witness having testified to material facts for the defendant, it was competent for the Commonwealth to prove that he had previously stated that he knew nothing about the case.
4. Competency of attorney as witness—An attorney is not incompetent to testify against the defendant by reason of the fact that he is assisting in the prosecution.
5. Even if the opinion of a physician as to the relative position of the parties at the time of the shooting, based upon the nature of the wounds, was not competent evidence, it was not prejudicial as it related to a matter as to which the jury could judge as well without this testimony as with it.
6. Instructions—Although the instructions as to self-defense was objectionable by reason of the fact that it failed to inform the jury who was to judge of the "apparently necessary self-defense," the objection was cured by another instruction, the two instructions together fully presenting to the jury the law of self-defense. Letcher v. Commonwealth. October 11, 1884. Jessamine Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. G. R. Pryor and Geo. Denny for appellant; P. W. Hardin for appellee.
7. Reversal error—The court refuses to reverse in this case upon the ground that a juror, who, when taking his seat in the jury box, made oath that he had neither formed nor expressed an opinion, had before the trial expressed an opinion that the accused was guilty, the question being presented for the first time on the motion for a new trial. Pulliam v. Commonwealth. October 14, 1884. Mercer Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Thompson & Bush, Bell & Wilson, E. H. Gaither and John C. Thompson for appellant; P. W. Hardin for appellee.
8. Instructions—An instruction to the jury that they must believe "that defendant not only shot the deceased unlawfully, but that said shot was the cause of his death," should have been modified on motion of the de-

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fendant by inserting the word "proximate" before the word "cause," it appearing that the deceased had pneumonia, and that the wound, which was not necessarily or probably fatal, was inflicted November 24, 1877, death not occurring until February 21, 1878. Huffman v. Commonwealth. October 16, 1884. Mercer Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Bell & Wilson for appellant.

9. Trial by judge—Although there is no provision in the Criminal Code authorizing a judge to try the accused upon the evidence, yet an agreement to this effect that has been executed will be in misdemeanor cases held valid in this court, but the finding of the circuit judge in such cases must be treated as the verdict of a jury and be given the same force and effect.

10. Prosecution under local option law—While in prosecutions under the "local option law" the court takes judicial notice of the passage of the law, it can not know that the law is in force in any particular locality except by averments and proof showing the prerequisite steps have been taken for its adoption. The only averments necessary for this purpose are that the county court, upon a proper petition, ordered a poll to be opened; that at a named time an election was held pursuant to that order, at which a majority of the legal voters in the district voted against the sale of spirituous, vinous or malt liquors; that the board of examiners of the election compared the vote and certified the same; and that the county judge caused the certificate to be spread upon the order book at a date named. These facts can all be proved by the production of the order book or a certified copy thereof. The certificate is prima facie evidence that the election was held and the result thereof.

11. Introduction of testimony—To promote the ends of justice the trial court must be allowed a wide discretion in permitting a party to introduce additional testimony after announcing himself through, and whether or not this discretion has been abused must depend upon the circumstances of the particular case. Ellison v. Commonwealth. October 1, 1884. Shelby Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. James W. Head for appellant.

12. Indictment against corporation—An indictment against appellee, which does not allege its existence as a corporation, is insufficient. Commonwealth v. C., N. O. & T. P. R. R. Co. October 1, 1884. Lincoln Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. R. C. Warren for appellant.

13. Exhibits must be embraced in bill of exceptions. Exhibits not embraced in the bill of exceptions, but copied by the clerk, with a statement by him that they are the exhibits referred to in the bill, can not be considered.

14. Local option law—Upon the trial of appellee under an indictment for violating "option law" in a certain civil district, there being no evidence that the act popularly known as the local option law was in force in that district, a peremptory instruction to find for the defendant was proper. Commonwealth v. Adair. October 15, 1884. Graves Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. C. H. Thomas for appellant; Robertson, Smith & Robbins for appellee.

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15. Misjoinder of defendants—Several persons can not be jointly indicted for indecent exposure of their persons, and the Commonwealth refusing under such an indictment to elect which one of the defendants it would prosecute, a demurrer to the indictment was properly sustained. Commonwealth v. Gest, &c. October 15, 1884. Trimble Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. S. Morris for appellant.

Practice in Civil Cases—

1. Where several cases have, by consent, been ordered to be heard together, an admission of fact entered of record by a pleading filed in one case will be treated as an admission in all. Bamberger, Bloom & Co. v. White, &c. Carter Bros., &c. v. Same. McClung, Day & Riley v. Same. October 29, 1884. Caldwell Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. F. W. Darby for appellants; Geo. W. Duvall and Wm. Marble for appellee.
2. Objections—There must be an objection as well as an exception to a motion to strike out a part of a pleading.
3. Bill of exceptions—Orders of court striking out parts of pleadings must be copied in the transcript, or an appellate court will not undertake to revise them. Such matters can not be properly embraced in the bill of exceptions, and mere recitals in the bill that such orders were entered will be treated as a nullity.
4. New trial—The time within which a motion for a new trial must be made begins to run when the verdict is returned, although judgment be not then entered upon the verdict. Dier, &c. v. Warman. October 8, 1884. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. John C. Russell for appellants; R. H. Thompson and Guy C. Sibley for appellee.
5. Judgment by default—When a cause of action is sufficiently alleged in a petition and the defendant answers without denying the material averments a judgment can be rendered against him by default upon the pleadings alone. It is not necessary in such cases that the cause should be assigned to a day upon the docket and be heard and submitted; it is sufficient for the plaintiff to move for judgment at any time after the filing of the answer. Duncan v. Hardin, &c. October 8, 1884 Breckinridge Cir. Ct. Opin. by Richards. J., Sup. Ct., aff. Stewart & Atchison for appellant; Kincheloe & Eskridge for appellees.
6. Where a party obtains a rule against the opposite party to verify his pleadings, but fails to cause the court to act upon the rule, he can not complain. Harris v. Lavin, &c. October 21, 1884. Floyd Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. R. H. Weddington and James Gobel for appellant; W. C. Ireland and W. S. Haskins for appellees.
7. Where the court, after overruling a demurrer to a pleading, becomes convinced that the pleading is bad, the order overruling the demurrer should be set aside and the demurrer sustained, with leave to amend. Baker & Rubel v. Whips, &c. October 30, 1884. Lou. Chy. Ct. Opin.

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by Pryor, J., Ct. Ap., rev. F. T. Fox, jr., for appellant; C. B. Seymour for appellees.

8. Waiver—A defendant having objected to the filing of a petition by a party to be made a party plaintiff did not waive that objection by obtaining time to answer.

9. A party whose claim is hostile to that of both litigants in a pending suit and who is not a tenant in common with either, or a joint owner, can not come in as plaintiff with a new and independent cause of action with reference to the same property, and require both parties to the original controversy to appear and answer as if he had been the original plaintiff, although his interest might require, upon a proper state of case, that the court should make him a defendant. Scott v. Wilson. October 30, 1884. Lewis Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. A. Duvall and John L. Scott for appellant: Wm. Lindsay for appellee.

Purchasers—

1 Liability for mortgage debt—When one buys land expressly subject to a mortgage upon it, he does not thereby assume any personal liability for the payment of the mortgage debt.

2. Insurance—Insurance taken out by the purchaser upon property purchased subject to a mortgage does not enure to the benefit of the mortgagee. Clay Fire, &c., Ins. Co. v. Hickman, &c. October 2, 1884. Campbell Chy. Ct. Opin. by Pryor, J., Ct. Ap., aff. E. W. Hawkins and Geo. R. Fearons for appellant; F. M. Webster for appellees.

Railroads - See Negligence—

1. Failure of railroad company to repair highway crossing—An indictment against a railroad company for failing to keep a highway crossing in repair must allege facts showing the corporation to be in law bound to keep in repair that portion of the highway claimed to be out of repair, and as the liability of the company in this respect can not under any circumstances be extended beyond the limit of its right of way, no indictment is sufficient that is not based exclusively upon the defendant's failure to repair within these limits. As the indictment in this case alleges that the offense was committed by reason of the condition of the crossing "and the approaches," without any averment that the approaches were within the company's right of way, it is insufficient. C., O. & S. W. R. R. Co. v. Commonwealth. October 22, 1884. Graves Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. W. W. Tice for appellant; P. W. Hardin for appellee.

2. Care in furnishing machinery—Railroad companies are not required to furnish the very best and latest improvement in machinery, but only that which is reasonably proper, when judged by what has been shown to be best by experience and use. Appellee was not guilty of negligence in the use of the frog known as the T iron or steel rail, it appearing that there are various kinds of frogs in use, and that it is a vexed and open

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question, about which experts differ, as to whether the cast, solid frog or the frog used by appellee is the safest. Young v. L. & N. R. R. Co. October 7, 1884. Jeff. Cir. Ct. Opin. by Holt, J., Ct. Ap., Aff. Whitaker & Parsons, Geo. C. Drane and Isaac H. Trabue for appellant; Wm. Lindsay for appellee.

3. An indictment charging appellee with the commission of a public nuisance by running its trains across a public highway without giving "the warning signals," is too uncertain, as the pleader may have intended to charge that the defendant did not cause both the bell to be rung and the whistle to be blown, when either the one or the other might have been sufficient to warn the public. Commonwealth v. L. & N. R. R. Co. October 1, 1884. Lincoln Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. R. C. Warren for appellant; W. Lindsay for appellee.

Sheriff—See Executions, 3.

Street Improvement—

1. Assessment for improvement of alley—All the property within a square in the city of Louisville should contribute to the cost of improving an alley extending through the square. It was error in this case to apportion the whole cost against the two quarter sections of the square through which the alley extends. Connelly, &c. v. Zable, &c. October 29, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. Elliott & Hemingray for appellants; S. B. Richardson for appellees.

Title—

1. The fact that a mother never conveyed or devised her interest in land to her children, through whom the plaintiffs claim, does not constitute a break in the chain of title, as, in the absence of anything to rebut it, they would hold the land as her heirs at law. Parker, &c. v. Smith, &c. October 11, 1884. Franklin Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. on original and rev. on cross appeal. Preston & Brown, John L. Scott and W. H. Sneed for appellants: Hord & Trabue for appellees.

Trusts—

1. The legal title to land having been acquired by purchase at an execution sale, under a verbal agreement with one interested in it that it should be held in security for the money advanced by the bidder and interest thereon, subject to the right of the person interested to redeem it, an enforceable trust was created. Craddock v. Ewin. October 23, 1884. Green Cir. Ct Opin. by Holt, J., Ct. Ap., aff Jeff. Kenney for appellant: J. W. Williams and D. A. Caldwell for appellee.

Voluntary Conveyances—

1. A voluntary conveyance is not void as to liabilities created subsequent to its execution, although created prior to its recording. Commonwealth v. Gibson, &c. October 28, 1884. Henderson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. A. T. Dudley and Montgomery Merritt for appellant; S. B. & R. D. Vance for appellees.

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Wills—

1. Where attesting witnesses, upon whose statements a will has been admitted to probate, testify in the circuit court against the will it is not proper for the court to instruct the jury as to the value of such testimony, and such an instruction was properly refused in this case.
2. The devisee being otherwise competent, the court erred in this case in refusing to allow him to testify for himself as to the competency of the testator after introducing other testimony, the testimony offered being in rebuttal and not in chief.
3. Testimony as to the conduct and statements of the devisee which affected his general character for integrity were incompetent, he not having been introduced as a witness.
4. A witness having testified to facts conducing to show that the testator was of unsound mind and stated that he had expressed to certain parties such an opinion, it was improper to introduce such persons to sustain the witness as to what his opinions were by proving his declarations to them on the subject. Ogden v. Ogden. October 23, 1884. Daviess Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. N. Sweeney & Sons for appellant; Owen & Ellis and G. W. Ray for appellee.

Witness—See Wills.

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EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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RECENT DECISIONS ON JUDICIAL SALES UNDER THE CODE.

Chapter 14 (Title X) of the Civil Code, regulating the important subject of sales of real property of persons under disability has been frequently construed since the passage of the Code in 1877. It will be useful to exhibit the cases at a glance with the modifications they make in the several provisions of the chapter.

Section 489 provides that a court of equity may order the vested estate of an infant or person of unsound mind to be sold * * * (3) for the maintenance of the infant where the suit is brought by the guardian. But he must be a guardian appointed in this State—one appointed in another State can not maintain the action (Allen v. Stump, 3 Ky. Law Rep., 504). This case was not brought under the Code, but under a section in Revised Statutes similar to the above.

(5) * * * For the reinvestment of the proceeds in other realty. But in a suit under this section by the mother holding the life estate against her children, holding the remainder, the mother was allowed to deduct from the proceeds of sale the value of her life estate and enough to maintain the children

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before making the investment required by the above. (Sawyer v. Guscurth, 3 Ky. Law Rep., 592.)

In proceedings under this section failure to appoint a guardian ad litem will not make the sale void (Browinski v. Phelps, 3 Ky. Law Rep., 59). Even though the proceedings may not be strictly regular, yet title will pass. (Tower v. Gabhart, 3 Ky. Law Rep., 622.)

Section 490 provides a court of equity may order the sale of a vested estate, jointly owned by two or more, on the petition of either * * * (2) if the estate be in possession and it can not be divided without materially impairing its value.

This section applies whether the estate be held jointly in common or in co-parcenary, though the terms of the section embrace only such as is held jointly. (Kean v. Tilford, 5 Ky. Law Rep., 655.)

The court may order the sale though all the parties are adults and free from disabilities. (McFerran v. Gossom, 2 Ky. Law Rep., 252.)

This section provides if the estate be in possession, yet in Kean v. Tilford, supra, the sale was ordered where some held the particular estate and others the remainder, yet so far as the latter were concerned their estate was certainly not an estate in possession, and, therefore, was not embraced in the section. (2 Bl. Com., 163.)

Section 491 provides that the owner of the particular estate (though an infant) may have a sale in an action against the owner of the remainder (though an infant). This section is unconstitutional so far as it authorizes the court to sell the interest of those not under disabilities. (Gossom v. McFerran, supra.)

Section 492 provides: "No sale shall be ordered where the deed or will forbids it." But where several own jointly one can not convey his interest with a clause against his grantee aliening, and so prevent a sale of the land at the instance of another joint owner. (Kean v. Tilford, supra.)

Section 493 which requires bond to be executed to a person under disability before a sale is ordered, and makes the sale

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void for failure to do so, apparently applies to sales under all sections of the chapter, but sales under section 490 are valid, though the bond be not executed. Kendall v. Briggs, 4 Ky. Law Rep., 852; while those under section 491 are void if the bond is omitted. (Barnett v. Bull, 4 Ky. Law Rep., 980.)

Notwithstanding the language of section 497, a sale of joint property may be ordered in the face of one of the joint owners objecting, if the property is such that it can not be divided without material injury. (Kean v. Tilford, supra.)

COURT OF APPEALS OF KENTUCKY.

HENDERSON, &c. v. MACK.

(Filed November 15, 1884—Not to be reported.)

Deed conveying land to A in fee simple and "with covenant of general warranty during his natural life, and after his death to go to and belong to B absolutely," construed so as to carry out the intention of grantor, notwithstanding the common law rule which gave effect to the first clause where several conflicted. Held—Under this deed A took a life estate and B the remainder in fee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Holt.

The only question presented by this appeal is whether, by the deed from J. M. Harris to James E. Young, the fee simple title to the property conveyed by it vested in him or merely a life estate, with remainder to the appellee, Belle Mack.

The granting clause of the deed reads as follows, to-wit: "Do hereby sell, grant and convey to the party of the second part, his heirs and assigns, the following described property;" and, save this statement, there is nothing in the premises of the deed bearing upon the question at issue.

The habendum, however, reads thus: "To have and to hold the same with all the appurtenances thereon to the second party, his heirs and assigns forever, with covenant of general warranty during his natural life, and after his death to go to

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and belong absolutely to Belle Mack, she paying the unpaid purchase money as aforesaid."

The general rule is, that while the last clause in a will must prevail if it conflicts with a preceding one, that in the case of a deed the rule is reversed; and in the latter case the first clause must prevail; and that when the habendum is in irreconciliable conflict with the premises or granting words of the deed, the latter must control.

We find no decision of this court which will serve as a precedent in this case; and while the courts in some of the States adhere strictly to what may perhaps be termed the technical rule above stated, yet this may be by reason of the fact that where the common law prevails the word "heirs" is essential in a deed to create a fee simple title in the vendee.

The proper end of all rules of construction is to effect the intention of the parties to the instrument; and the intention of the grantor in a deed is to govern when it can be ascertained, equally as in the case of other instruments.

In arriving at it the entire paper must be considered.

Blackstone says that the construction must "be made upon the entire deed, and not merely upon disjointed parts of it."

If clauses are repugnant to each other they must be reconciled if possible; and the intent and not the words is the principal thing to be regarded.

The technical rules of construction are not to be resorted to when the meaning of the party is plain and obvious. (Noyes & Co. v. Nichols, 28 Vt., 159.)

In Jackson v. Meyers, 3 Johns, 388, Kent, C. J., states the rule in these words: "The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent and not the words is the essence of every agreement. In the exposition of deeds the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect."

Applying these rules of construction to the deed in question we can not escape the conclusion that it was intended by it to

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create but a life estate in James E. Young, with a remainder right in Belle Mack.

The office of the habendum clause in a deed is to limit and define the estate granted; and while, as a general rule, it must give way to the granting words of the deed when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument to arrive at the intention of the maker, which must govern, when ascertainable.

When the intention does not appear, then the words of grant should govern if repugnant to the habendum of the deed; but if the intention is apparent, then it should govern. This rule, we believe, is consistent with reason and upheld by authority.

If the language of the deed admits of more than one construction, then the intention of the grantor, gathered from the whole instrument, should be regarded.

The words in the deed in question, "during his natural life, and after his death to go to and belong absolutely to Belle Mack, she paying the unpaid purchase money as aforesaid," clearly express the intention to provide for Belle Mack.

As she was not a party to the deed she could take no interest in presenti by it, but only a remainder estate; and hence to give it any effect whatever as to her it must be construed as vesting only a life estate in James E. Young.

The words "his heirs and assigns" found in the granting words of the deed were evidently those of mere form, used by an inexperienced draftsman, and were not intended to create a fee simple estate.

This is apparent from the fact that they were used in a still stronger, but yet common, form in the habendum.

Immediately preceding the words which created a remainder estate in Belle Mack, and in the same clause, is to be found the expression "to the second party, his heirs and assigns forever," and we must conclude that they were used in both the granting and habendum clause as a matter of mere form.

Judgment affirmed.

Bell & Wilson for appellants.

Thompson & Roach for appellee.

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PARRISH, &c. v. FERGUSON, &c.

(Filed November 20, 1884.)

Costs—Charging for copy not made—Where a party uses the original record in the Court of Appeals, upon an agreement with the clerk that a copy shall be charged against him as if in fact made, the clerk may include the cost of such copy in his taxation and have execution for it against the unsuccessful party.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Hines.

The court being sufficiently advised delivered the following opinion on said motions, viz:

This is a motion to quash an execution in favor of the clerk, issued from the clerk's office of this court, upon the ground that it embraces a charge for copying a record which was not in fact copied. It appears that counsel for the party who was successful in this court obtained permission from the clerk to use the original record, instead of having a copy, upon the agreement that his client should be charged with a copy as if in fact made. The charge was so made against the party obtaining the record and on final judgment his cost in this court, including a copy of the record, was taxed against the unsuccessful party.

Prior to 1856 it was the well-settled practice in this court to allow such charges, although the letter of the law authorized a charge for a copy only. On the 3d of March, 1856, the legislature passed an act forbidding a charge for copy of record unless actually made, and prescribing a penalty against the clerk for permitting a record to go out of his office except in cases provided by law (1 Stanton's Revised Statutes, volume 1, page 535). The General Statutes, adopted December, 1873, omitted both provisions of the act of 1856, and provided under the general head of clerk's fees (chapter 41, page 459-60) for the fees of the clerk of this court. The omission to embrace the provisions of the act of 1856 in the General Statutes, under the authority of Broaddus v. Broaddus, 10 Bush, 299, repealed the act of 1856 requiring a copy of a record to be in fact made and forbidding the clerk to allow a record to go out of his office except in cases provided by law. That the intention to repeal

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this law existed in the adoption of the General Statutes is strengthened by the provision therein that "no clerk of an inferior court shall permit the records or papers of his office to be removed or taken out of the county in which his office is kept except in cases of invasion or insurrection, or in obedience to a summons" (General Statutes, article 1, section 6, chapter 16). This provision is not found in the Revised Statutes, and its enactment in the General Statutes, together with the omission to re-enact or continue in force the act of 1856, makes it clear that the intention was not only to repeal the act of 1856, but to recognize the former well-known custom or practice in this court of charging a party using a record for a copy as if in fact made. Since the adoption of the General Statutes the practice existing prior to the act of 1856 of allowing the clerk to charge the party using a record with a copy as if actually made has been resumed and uniformly followed. It has in fact been repeatedly and expressly recognized by this court in overruling motions to quash executions for such costs recovered by the successful against the unsuccessful party. Under these rulings the litigants in this court and the clerks have acted until such rulings have acquired the sanctity of judicial findings to such an extent that we do not feel justified in overturning them. The unsuccessful party has no cause of complaint. The party using the record is charged as if a copy had been made for him; the charge is not made against the party complaining, and he is in no worse attitude than he would have been if the copy had been actually made. (General Statutes, section 32, article 26, chapter 41, page 460.)

Motion overruled. Judge Holt not sitting.

S. D. Mitchell, W. H. Julian, W. B. Harrison and John McCord for plaintiffs in motions.

H. L. Stone, W. Lindsay and A. Duvall for defendants in motions.

ASHBROOK v. ROBERTS, &c.

(Filed October 25, 1884.)

1. **Lien for purchase money—Assignee—D. sold a tract of land to R. for which R. paid part in cash and executed a note for the balance. R. being**

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indebted to his son, subsequently procured D. to make a deed to the land directly to the son, without reserving any lien in favor of the purchase note. D. having assigned the note to A., the latter brought suit against the son claiming a lien on the land. Held—A. could not recover. He held an equitable lien only. The son's equity as an innocent purchaser without notice was equal to that lien.

2. Pleading—Signing—The word "signed" as used in Civil Code, section 115, requires that the name of a party or his attorney be written at the end of a pleading; it is not sufficient that the name is written on the back; but where a pleading so signed is objected to, the objection overruled and the pleading admitted, the court can not afterwards render judgment against the pleader on account of the defect without first giving him leave to amend.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Holt.

On April 12, 1869, A. Day sold to the appellee, Henry Roberts, by executory contract, 60 acres of land for $3,300, all of which was then paid save $1,650; and for this last-named sum the latter then executed to said Day a note payable on April 1st, 1870, which the latter assigned to the appellant, Ashbrook, on April 17, 1869.

Henry Roberts, as guardian, was indebted to his son, W. S. Roberts; and in order to pay him he, on September 20, 1870, sold him the land, the price exceeding the said indebtedness by $498.83; and for this sum the son then executed his note to his father, payable one day thereafter, and which subsequently came to the hands of one Conrad; and at the same time Henry Roberts procured Day to convey the land directly to W. S. Roberts, the deed reserving no lien, save in favor of Henry Roberts for the $498.83, and acknowledging the payment of the $3,300.

On October 23, 1877, the appellant, Ashbrook, brought this action, asserting a lien upon the land for a balance owing him upon the $1,650 note, and seeking to enforce it as well as to obtain a personal judgment against Henry Roberts.

The petition also alleges that the lien reserved in the deed for the $498.83 enured to the appellant's benefit, and asks that he be substituted to Henry Roberts' rights as to it; but by the judgment now in question this point was reserved; and hence it is not in issue upon this appeal.

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The lower court decided that the appellant, Ashbrook, had no lien upon the land by reason of its not being reserved in the Day deed; and he has appealed, while the appellee, Henry Roberts, by a cross appeal, seeks to reverse the personal judgment that was rendered against him.

The demurrer to his answer was properly sustained, as it presented no defense to the action; and leave being given to amend, he presented and offered to file an amended answer, in which he alleges that he had filed his petition in bankruptcy; that his protection paper had issued; that his discharge would soon be granted, and that no judgment should be rendered against him.

The appellant objected to its being filed, but the court overruled the objection and it was filed; and at the same term of the court, and within five days thereafter, the cause was submitted and a personal judgment rendered against the appellee, Henry Roberts, because (as therein stated) "there is a paper in the bundle which seems to have been intended for a plea of bankruptcy, but it is not signed."

The old Code of Practice required every pleading to be "subscribed" by the party or his attorney; while the new Code has substituted the word "signed." (Civil Code, section 115.)

In this instance the pleading had no signature whatever to it at the close; but upon the outside and below the indorsement upon the back of it appeared the name of the person who was the attorney of Henry Roberts, as shown otherwise in the record.

It is contended that this was a sufficient signing under the statute; and that if the name of the party pleading or his attorney appears even in the body of the writing, that, as in the case of a will at common law, it can not be rejected upon the ground that it is not signed.

The ordinary legal meaning, however, of the word "signature" is that the person's name has been written at the end of the instrument; and as used in the Code of Practice the words "sign" and "subscribe" have the same import. (Civil Code, section 732.)

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The provision of the Code upon the subject being imperative, the amended answer was defective; but the court had in effect overruled a demurrer to it by permitting it to be filed, although objected to by the appellant.

It had thereby in substance said to the party that his pleading was sufficient; and yet, without the least intimation to him, so far as is shown by the record that the court had changed its opinion, it, at the same term in a final judgment, rejected it, and thereby deprived the party of any opportunity to amend.

Such a practice can not be sanctioned, as it would defeat instead of promote justice, the attainment of which is the object of the Code and all law.

The court, by its own error misleads the party and creates the belief in his mind that his pleading is sufficient; and then, without affording him an opportunity to amend, the cause is submitted upon the motion of the adverse party, and a final judgment rendered against him because the pleading, which the court has just said was sufficient, is in fact defective.

If the order filing the amended answer had been proper, then the action did not stand for trial at that term; and as it was improperly made the court should have set it aside, or in some way notified the appellee that the pleading was insufficient, and given him an opportunity to amend it. (Edison v. Tatum, &c., 1 Ky. Law Rep., 418.)

There is no charge of fraud upon the part of the appellee, W. S. Roberts, in the making of the deed to him by Day; but it is claimed that he had knowledge and notice, when it was made, of the existence of the Ashbrook $1,650 note, and that it was unpaid.

This he denies, and there is no testimony whatever to sustain the charge.

It is urged that as the note was a lien upon the land when it was assigned to Ashbrook, that he can not be deprived of it without his agency and that it still exists, as he had nothing to do with the making of the deed by Day to W. S. Roberts, sed non sequitur.

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There is nothing to show that Henry Roberts did not in fact owe his son, W. S. Roberts, or that there was any fraud upon the latter's part, or that he had any notice of the appellant's claim when the deed was made to him.

He holds the legal title to the land as an innocent purchaser for value.

He and the appellant have alike acted in good faith, and both are entitled to the consideration of the court. In such a case, as one of them must suffer, the chancellor will leave the loss where he finds it, and not relieve the one by removing the loss from him and placing it upon an equally innocent party.

While disliking to allow injustice, yet action by the court in such a case would inflict it. Moreover, all things being equal, the innocent purchaser is more favored in law than the bona fide creditor; and in this instance the former is the defendant, and, therefore, occupies the best position, as the latter is compelled to ask the aid of a court of equity for relief. (Summers v. Kilgus, &c., 14 Bush, 449.)

His claim to a lien is purely equitable as it was not retained in the deed. If it exists at all, it must be as a creature of equity, while the purchaser has an equal, if not a superior, claim to the equitable consideration of the court; and in such a case, in the absence of notice, such a lien can not be enforced.

The judgment is affirmed upon the original appeal and reversed upon the cross appeal of Henry Roberts and cause remanded for further proceedings in conformity to this opinion.

C. W. West for appellant.

L. M. Martin and T. T. Foreman for appellees.

WITTY v. C. & O. & S. W. R. R. CO.

(Filed November 22, 1884.)

Verdicts—Special—General—Separate general—Where the jury are directed to find a special verdict the court may, but is not compelled to, direct them to find a general verdict also. (2.) If a special verdict is required of them the court may refuse to give any instructions on the law for the case, reserving to itself the right to apply the law to the facts after they are found in the special verdict. (3.) A separate general verdict defined.

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Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Hines.

This is an action to recover damages for an injury received by appellant through the alleged willful and gross negligence of appellee while appellant was in its employ as brakeman. Appellee denied any kind of negligence, and pleaded contributory negligence on the part of appellant. On application of appellee the jury were required to answer certain questions, in the nature of a special verdict, and at the same time appellant also propounded numerous questions which were answered by the jury, but the court, on the application of appellant, refused to instruct the jury to find a general verdict and neglected to define to the jury the meaning of willful or gross negligence.

The facts testified to by appellant are that he was braking on a freight train of appellee near McHenry Mines when the train was divided into two sections and appellant directed by the conductor, who remained with the rear section, to go with the front section, to which the engine was attached, down to the switch at McHenry Mines and throw the switch so the rear section might follow and be run onto the side track, and that when he had so thrown the switch to cause two whistles to be sounded and that the conductor would then bring down the rear section and run it onto the switch. Appellant testifies that, as directed by the conductor, the engineer, the fireman and himself went down the main track past the switch, stopped the engine, opened the switch and had two whistles sounded for the conductor to bring down the rear section; that after waiting some fifteen or twenty minutes, and seeing and hearing nothing of the rear section, he walked around a curve in the road to ascertain the cause of the conductor's delay, and saw that his cars were "stuck." He then returned, without direction from the conductor or anyone, closed the switch, informed the engineer that the rear section was "stuck," and requested him to back up and assist in moving the rear section; that in obedience to this direction the engineer backed

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his train and in going around the curve a collision occurred between the two sections, both at the time moving from opposite directions, and appellant, being on next to the rear car of the front section, was injured. Appellant also testifies that in so backing a train the rules of the road required that three whistles should be sounded, and this was not done, but there is other evidence tending to show that the signal was given. There was also evidence tending to show that the car that was wrecked, and which resulted in the injury to appellant, was decayed and insecure. This is enough of the evidence to illustrate the questions of law presented.

The principal complaint of appellant is that the court refused to direct a general verdict in addition to the special findings; that the court erred in not defining to the jury the difference between ordinary and willful or gross neglect, and that the directions for special separate findings were so numerous and involved as to be misleading to the jury.

To the first inquiry presented to the jury at the request of appellant they found that appellant was damaged by the collision in the sum of $5,000. The second was as follows: "If you say he was damaged, was the injury the result of plaintiff's own negligence or the negligence of the defendant?"

Answer. "Plaintiff's own negligence."

The 5th is: "If you find that the engineer was negligent in not giving the proper signal of his movements at the time of the alleged injury, then you will say so, and also whether said negligence was gross or only ordinary."

Answer. "Ordinary."

The seventh requires the jury to say whether, at the time of or before the collision, the engineer and conductor by ordinary care could have prevented the injury.

Answer. "At the time they could not."

The eighth requires the jury to say whether, if the car wrecked was defective, "it could have been discovered by the close scrutiny and inspection of skillful and competent inspectors." The jury answered: "We think not."

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On the request of appellee the jury found that the engine was signaled to move back by appellant, and that he gave the signal of his own accord, without any direction from the conductor or anyone else. The sixth inquiry for appellee was: "Would said accident, in which plaintiff was injured, have occurred if the plaintiff had not given such signals to said engineer." Answer, "No."

The 14th inquiry is: "Did the employes of the defendant, other than plaintiff, upon said two parts of said train while said sections were approaching each other, and as soon as they knew there was danger of a collision thereof, or as soon as they reasonably might have known it, make the proper effort to stop said car and prevent such collision?" Answer. "Yes."

A consideration of the questions raised by counsel involves the necessity of construing sections 317, 326, 327, 328 and 329 of the Civil Code.

Subsection 5 of section 317 is: "Either party may require the court to direct the jury to find a separate general verdict with the general verdict, or to find a special verdict. If a special verdict be so required, the questions of law may be reserved by the court until after verdict; but if a general verdict be required, either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury."

Subsections 1, 2 and 3 of section 326 defines the meaning of the different verdicts that may be returned under the Code.

"Subsection 1. A general verdict is that by which the jury pronounces generally, upon all the issues, for the plaintiff or for the defendant.

"Subsection 2. A separate general verdict is the finding, upon any of the issues, in favor of the plaintiff or the defendant.

"Subsection 3. A special verdict is the finding of facts by a jury, as shown in their answers to questions submitted to them in writing."

Section 327 of the Code is: "Unless otherwise directed, the jury may find a general, or a general and separate general ver-

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dict or a special verdict, with or without a general, or a separate general verdict; but the court may without motion, or upon the motion of a party, shall direct the jury to find—

"1st. A separate general verdict as to any issue; and with such finding the jury shall also return a general verdict; and if the separate general verdict be inconsistent with the general verdict, judgment shall be rendered pursuant to the former; or,

"2d. A special verdict; and on such finding the jury shall return a special verdict only, and the court shall render judgment upon it."

Section 828 is: "If a general and a special verdict be inconsistent, judgment shall be rendered pursuant to the latter."

Section 829 is: "If by a general verdict either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."

The first inquiry is as to what is meant by a "separate general verdict." So far as we are informed there is no such provision that has been judicially construed in any of the American codes of civil procedure. It is not found in our Code of 1854, which was superseded by the present Code herein quoted and which went into effect January 1, 1877. This expression is defined as a finding "upon any of the issues in favor of the plaintiff or the defendant," while a special verdict is defined as "the finding of facts by a jury." The distinctive characteristic between the two seems to be that in the one case the jury pass upon an issue made by the pleadings, that may be constitued of many facts, and in the other they pass upon the existence of facts, without reference to their relation to any issue.

The meaning of the expression "separate general verdict" is that the verdict is separate as to the particular issue, as distinguished from any other issue in the case, and general as to the particular issue. That is, it was intended to apply in cases where there is more than one issue. For instance, an action upon an alleged contract, when the issues presented are, first, was the contract porcured by fraud or duress, and, sec-

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ond, if it was so procured, and, therefore, voidable, was it subsequently ratified by the defendant after a full knowledge of the fraud and the removal of the duress? If in such case the jury should find a general verdict for the defendant the court could not determine whether it was based upon the ground that the evidence authorized the conclusion that there was fraud or duress sufficient to invalidate the contract, or upon the ground that there was not evidence requisite to establish a ratification. The evidence might preponderate in favor of the conclusion that there was fraud or duress sufficient to invalidate the contract, but at the same time the evidence upon the issue of ratification might be such that the preponderance in favor of a ratification would be so overwhelming that the court should grant a new trial. The propriety and usefulness of this provision of the Code as to separate general verdicts may be better illustrated by a case where the issues are, first, whether the defendant was an infant when he purchased goods from the plaintiff; second, whether, if he was then an infant, he ratified the contract after he become of age; and, third, whether, though he was an infant when he purchased the goods, they were suitable to his financial condition and to his station. In such a case a general verdict for the plaintiff would leave it uncertain whether the jury went upon the ground that the defendant was of age when he purchased the goods, or upon the ground that he ratified the contract after coming of age, or upon the ground that the goods were necessaries; and consequently the court could not grant a new trial if there were evidence conducing to sustain the plaintiff's allegations as to anyone of the issues, though there may have been a preponderance of evidence against him upon that issue, and though he may have failed to sustain his allegations upon the other issues. This is the instance given by the editors of the Code of the evil probably intended to be provided against by the adoption of this section. If a separate general verdict is asked for the court shall grant it, and with it shall require the jury to return a general verdict. In such cases it is not only proper, but necessary, that the jury should be instructed by the court

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as to the law applicable to the particular issues to be found by the jury as fully as if there was only one issue in the case, and the jury were required to find a general verdict thereon. But when a special verdict is demanded the court "shall" grant it, and may reserve the questions of law until after the special verdicts are returned. The court in its discretion may also direct a general verdict, but it is not compelled to do so as in the case of a separate general verdict; if, however, the court does direct a general verdict it shall instruct the jury as to the whole law of the case. Under the Code of 1854 the court was not compelled to grant the request for special verdict (Section 347; Louisville & Nashville R. R. Co. v. Case's Adm'r, 9 Bush, 735). In directing special verdicts the court should confine them to the controlling facts in the case, and they should be such as to enable the court on the return of the verdicts to apply the law and enter judgment without anything further from the jury; and where either party may be entitled to recover money, or where damages are to be assessed, the court should direct the jury, as was done in this case, to assess the amount of recovery. In this case the jury found the essential and controlling facts necessary to an intelligent application of the law by the court, and the facts so found by the jury were of such a nature that the court would have been compelled to enter judgment for the defendant, even if there had been a general verdict for the plaintiff.

The complaint by counsel for appellant that the requests for special verdicts were more numerous than the case required is well founded, but they are neither so numerous or irrelevant as to have misled the jury. The answers returned are manifestly the result of an intelligent comprehension by the jury of all the requests submitted by the court.

The failure of the court to instruct the jury as to what is ordinary and what is willful or gross neglect was not error, because, when all the facts are found by the jury, this is a question of law properly reserved by the court under section 317 of the

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Code. Such an instruction would be essential when the jury are directed to find a separate general verdict on an issue where the verdict would turn upon the character or degree of negligence.

Judgment affirmed.

J. W. McPherson and Joe McCarroll for appellant.

Holmes Cummins for appellee.

BRANNIN & CO. v. LOVING, &c.

LOUISVILLE CITY NATIONAL BANK v. SAME.

(Filed November 11, 1884.)

1. Banks—Liability of president and directors—The charter provided that the bank should not at any time be indebted in excess of its paid-up capital. At a time when the bank was indebted in excess of this sum the president put the bank's name on a bill of exchange as endorser, and sold the bill to plaintiff. When the bill matured the bank was found insolvent and plaintiff brought suit against the president and directors, seeking to hold them personally liable for violating the charter. Held—The directors were not liable because they are bound to ordinary diligence only, and neither gross carelessness nor even knowledge on their part of the issuing of the bill was shown. But of the president a higher degree of diligence is required than of a director, and he is liable because he in person endorsed the bill when he knew, or is conclusively presumed to have known, that the bank was already indebted in excess of the amount allowed by its charter.

2. Release, effect of—Plaintiff having, with the consent of the bank, released S., the accommodation acceptor of the bill, who was liable to plaintiff ex contractu, Held—That release did not affect the personal liability of the president in tort for his negligence.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

By an act of the legislature, approved March 29, 1872, the "Exchange Bank and Tobacco Warehouse Co.," of Louisville, was incorporated, and authorized to transact a general banking and warehouse business.

Section 16 of the charter provides that "the indebtedness of this corporation, over and above that incurred for deposits of money, shall at no time exceed their paid-up capital stock."

On May 29, 1875, the "manager" of the warehouse department, by the direction of the appellee, Harvey, who was then

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the president of the company, drew a bill of exchange in its favor upon Spillman & Mitchell, of Scottsville, Ky., and which for accommodation was accepted by them, for $5,000, payable at the Merchants National Bank of Louisville, Ky., four months thereafter, and which was indorsed in blank to the appellants, Brannin & Co., for value and before maturity, in the name of the corporation by its said president.

On June 1, 1875, a like bill was drawn and accepted, save it was for $3,000; and it, before maturity and for value, was in like manner indorsed to the appellant, the Louisville City National Bank.

On June 4, 1875, a third similar bill was drawn and accepted, save it was for $4,000, and payable 130 days thereafter; and it also, before maturity and for value, was similarly indorsed to the Bank of Shelbyville.

When these three bills, amounting to $12,000, were thus negotiated the paid-up capital stock of the company amounted to but $58,900, estimating $15,000 of real estate as a part of it, while its indebtedness theretofore created amounted to a much larger sum, not counting what it was owing to depositors.

The bills held by Brannin & Co. and the Louisville City National Bank not having been paid at maturity, and both the Exchange Bank and Tobacco Warehouse Co. and Spillman & Mitchell having become insolvent, these actions were brought against C. F. Harvey, W. V. Loving and L. Bronner for the purpose of making them personally liable for them, by reason of having been directors of said company when they were negotiated. At the time this was done the cashier, who made the sales, incorrectly represented that the bills were secured by property then in pledge to the company for their payment, and the plaintiffs seek to recover, first, upon the ground that the defendants were guilty of positive fraud in connection with the sales; and, secondly, because the indebtedness was created in violation of the company's charter. The lower court held that the defendants were not liable. The first ground upon which a recovery was sought is altogether unsustained by the

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testimony. In fact the judgment of the court below recites that upon the trial there it was abandoned by the counsel for the appellants, and they do not now insist upon it; so that the second ground is alone to be considered.

The directors of a bank are, in a qualified sense, the bank itself. They occupy a more responsible position than that of mere agents or the officers of an ordinary corporation.

By reason of the trustee character of the bank, the great facilities its officers have for committing frauds, the inability of the public to know its condition and the supreme control the directors have over its affairs, it becomes the duty of the latter to so conduct the business that any misconduct can not longer continue. The banks transact the business of the country so largely, and those dealing with them are compelled to rely on their officers so implicitly, that the extraordinary privileges accorded to them should be properly exercised.

The services of directors are, however, usually gratuitous; they are entitled to no compensation in the absence of a contract for it, and are only required to exercise the same care that an ordinarily prudent man would in his own business of a like character.

The appellees, Loving and Bronner, had no knowledge whatever of the making or negotiation of the bills sold the appellants, and never approved the same.

The transactions were isolated, and the exercise of ordinary care upon their part did not afford them notice or enable them to stop them; and being isolated, it must not be presumed that they had notice of them simply because they were directors.

To hold them liable we must require of them "unremitting vigilance in relation to the matters intrusted to their control;" and this is not the proper rule. (Railroad Co. v. Bridges, 7 B. Monroe, 556.)

If they were guilty of negligence to any extent it was not of such a gross character as to subject them to a personal liability.

The appellee, Harvey, however, stands in a different attitude.

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While there is no evidence of mala fides upon his part, and while no motive of personal gain can be imputed to him, yet he was not only a director, but the chief officer of the company: and a higher degree of diligence is required of the president of a bank than of the other directors.

He is expected to exercise a more constant and immediate supervision over its affairs than one who is merely a director.

In this instance Harvey directed the bills to be drawn; he directed them sent to Spillman & Mitchell for acceptance; and he indorsed them in the name of the company after the cashier had negotiated their sale.

As to him it is not a question of neglect, but the violation of a known duty, and, therefore, a breach of trust, amounting to a tort; and nearly a century and a half ago Lord Hardwicke said, in the celebrated case of the Charitable Corporation v. Sutton, &c., 2 Atk., 404, that a court of equity would lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity.

The community had a right to assume that the president of the company was familiar with its condition; it must be conclusively presumed that he was familiar with the provisions of the charter, and even if he acted in ignorance or innocently he is not excusable as in case of a mere error of judgment.

If he did know its condition and the provision in its charter and created the indebtedness, then he is certainly liable; and if he did not have such knowledge, then there was such a want of information as was absolutely necessary to the proper performance of his duty, and he is responsible for assuming to act without it.

He assumed to act under a charter containing a provision so plain that it could not excusably be broken by him, and when it was his duty to know the condition of his company, and under such circumstances he is equally as responsible as if he had been guilty of fraud.

Although acting bona fide, he had no right to create the debt; it was not merely an omission, but a positive violation

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of his duty by which an innocent outside party is made to suffer, and one who had placed confidence in the implied assertion of authority arising from the making of the paper.

In such a case it is not only just, but mercantile interests require that the agent should be held personally liable instead of permitting the loss to fall upon an innocent party, who has been thus misled. If one of two innocent parties must suffer it must be the one who has caused the loss, and induced the other to place a false confidence in his acts.

In the case of Schley, &c. v. Dixon, &c., 24 Ga., 273, it was held that, as the charter of the Planters & Mechanics Bank of Columbus required a certain amount of the capital stock to be paid in before it could issue notes, and as the directors had issued them before it was done, they were, therefore, personally liable to the creditors of the bank, it having become insolvent; and it is a general rule that if a special deposit is converted, or a fund misemployed by the agency or consent of the president or directors of a bank, they are responsible. It is an abuse of extraordinary privileges for which there should be a remedy; and in this instance an agent of a high grade having wrongfully held himself out as having authority to do an act, can not now shelter himself under the assertion that he believed he had the power or that he acted innocently.

If the directors of a bank declare a dividend when the bank is so much embarassed, that it is done either through fraud or folly, and which would not have been advocated by anyone save from dishonesty or incapacity, they are personally liable. (Morse on Banks and Banking, page 77.)

In this instance the provision in the charter was a wise one; it was intended to protect the public, who could not know the condition of the assets of the bank, but who, being asked to deal with it, had a right by virtue of its charter to rely upon sufficient capital being kept on hand to balance the indebtedness; and the appellees, Loving and Bronner, are not held liable because they had no part in the creation of the debt in

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question, and were not, in our opinion, guilty of willful carelessness or gross negligence as to it.

It is urged, however, that, inasmuch as the appellants, by an agreement with Spillman & Mitchell, extended the time of payment of the bills, thereby the appellees were released from any liability that may have existed; and that this is certainly so as to the appellants, Brannin & Co., because they accepted a certain sum from Spillman & Mitchell and released them from further liability.

The latter were bound by contract, while the appellee, Harvey, is sued and liable for a tort: and we have been able to find no direct authority upon the question whether a novation of the contract or a release of the one in such a case releases the other.

A release by the creditor of one joint obligor releases another because it is an admission that the debt is paid; and it is an interference with the right of the obligors as between themselves.

A release of one joint trespasser releases the others because each is considered as sanctioning the acts of all the others, thereby making them his own and thus rendering himself liable for the entire damage as occasioned by himself. He is considered as committing the entire injury, and a satisfaction therefor as to him is considered as in full of the claim.

As between one liable by contract and one responsible for a tort committed in connection with the contract, however, there is no right of contribution as there is no privity between them; and, therefore, no one is affected by a release in such a case save the parties to it; and the reason for its operating as a release to anyone save the party to it fails.

In this instance, however, Spillman & Mitchell were merely accommodation acceptors; and hence the bank could not, in any event, have had any claim against them.

Moreover, all the parties to the bills consented to the extension of the time of payment, and the bank waived any objection to the release of Spillman & Mitchell by Brannin & Co.,

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which must be considered as a consent to it. The release was expressly confined in its operation to Spillman & Mitchell, and expressly reserved the rights of the appellants as to all other parties, and it was plainly not a satisfaction of the claims.

The owners of the bills seem to have acted prudently as to the extension and release, and in the manner calculated to best prevent loss to the appellees.

The injury to the appellants has resulted from Harvey's act and not from their neglect or any indulgence or release given by them. (Hord v. Chandler, 13 B. Monroe, 403.)

One may sue instantly in damages for a fraud or a tort committed in the sale of a note. In such a case, to entitle him to recover, he must prove the sale, the fraud or tort, and ordinarily the insolvency of the obligor. (Cope v. Arberry, 2 J. J. Mar., 296.)

In this case there is no sufficient denial of the insolvency of Spillman & Mitchell and the company at the maturity of the paper.

Wherefore, the judgment is affirmed as to the appellees, Bronner and Loving, but reversed as to the appellee, Harvey, for proper proceedings in conformity to this opinion.

Judge Lewis not sitting.

Horace C. Brannin for appellants.

P. B. Muir for appellees, Harvey & Bronner; and Barrett & Brown for W. V. Loving.

YORK v. COMMONWEALTH.

(Filed November 1, 1884.)

Manslaughter—Sheriff—Deputy—Right of to act out of county—The sheriff of Clinton county having a bench warrant for the arrest of P., appointed defendant his deputy to make the arrest. Defendant arrested P. in another county, and in making the arrest handled a gun with which he was armed so recklessly that it went off and killed P.'s companion. Defendant being indicted for murder, Held—First, the bench warrant and endorsement of the sheriff deputizing defendant are incompetent evidence to show that the defendant was acting officially; second, a sheriff can appoint a deputy to execute process in the county only, he can confer no power to act in another county; this rule applies alike to civil and criminal process; third, an instruction on

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the law of involuntary homicide was not proper in this case. One who acts recklessly of human life is presumed to intend the consequences of such acts, and if death ensures is guilty of manslaughter.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Holt.

The appellant, A. A. York, having been sentenced to five years' confinement in the penitentiary upon a conviction under an indictment charging him with the murder of Richard Kilpatrick, seeks a reversal of the judgment by this appeal.

If it be true that the trial jury were not properly selected by their names not being drawn from the regular panel, or if the Commonwealth's attorney pro tem, who prosecuted the case, had been previously retained to prosecute the appellant, yet he can not rely upon these facts for a reversal in this court, because even admitting that they would constitute reversible errors if properly presented, yet the record discloses the fact that he made no complaint upon this score until the motion for a new trial was made, and that he then, for the first time, excepted to such action; and a decision of the lower court upon a motion for a new trial is not subject to exception. (Criminal Code, section 281.)

The consideration of the other alleged errors requires a brief statement of the facts attending the killing.

The sheriff of Clinton county having a bench warrant for the arrest of one James Poore, that had issued upon an indictment for a misdemeanor pending in the circuit court of said county, and having been unable to execute it, he, by the proper indorsement upon it, authorized the appellant to arrest said Poore.

Upon the night of the killing the defendant, with one Spearman, went to the house of the father of the deceased, with whom the son lived, and which was in Cumberland and not in Clinton county, for the purpose of arresting Poore, the appellant having learned that he would be there that night.

The testimony tends strongly to show that the father had notified the appellant that Poore would be there that night,

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and had requested him to come and arrest him, as he did not desire his son to be in his company.

Upon their arrival the father informed them that his son and Poore were not then there, but to secrete themselves near by, and that they would detect their coming from the barking of the dog; and then to wait until they had time to retire, and to then enter the house, the door of which would be left open for that purpose.

Accordingly they waited until some time in the night when they entered the house, each being armed with a shot gun, and the appellant having in the yard, and before entering, cocked both barrels of his gun. His companion told him "there was no use in that and to unlock it," but he persisted in doing so.

Spearman went in first, holding his gun so that the muzzle of it pointed down at the floor, while the appellant followed, with his gun cocked and presented at the bed in which were lying both Poore and young Kilpatrick.

Spearman went to the bed, laid his hand on Poore, and told him to surrender, and he replied that he would do so.

Just at this time, and when the appellant was standing in the middle of the room with his cocked gun leveled at Kilpatrick, the latter raised upon his knees in the bed and said "Don't shoot;" Spearman raised the same cry; and immediately the gun fired and killed Kilpatrick.

The testimony does not show whether the appellant pulled the trigger or whether the gun was discharged by accident; and it is conflicting as to whether the appellant said immediately after the firing that it was an accident, or "you see what I can do with a damn man."

It is probable that the jury did not believe that he made the latter statement; also that he did not say on the road that night and before the killing, as testified by one Wolfe, that "if Poore resisted he would kill him; and if Dick Kilpatrick made an attempt he would shoot him," else they would hardly have found a verdict of manslaughter.

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The fact that the appellant had been deputized by the sheriff of Clinton county to arrest Poore did not authorize him to do so in another county.

While a sheriff may by writing empower any person to execute a process, yet the action of the sheriff himself under it is limited to his own county, and the power conferred can not exceed that of the principal. It is true that a criminal warrant is not directed to the sheriff of any particular county, as in the case of a civil summons, but it is not done in order that any sheriff may receive and execute it within his county. (General Statutes, chapter 100, sections 7, 10.)

Hence it follows that the copy of the indictment and bench warrant against Poore with the indorsements thereon, as well as the testimony tending to show that the appellant was acting under said warrant, were not competent testimony.

But even if the law were otherwise, yet the defendant in fact got the benefit of it, as he was allowed to show by Spearman that he (appellant) had, at the time of the killing, the bench warrant, and had been deputized by the sheriff of Clinton county to execute it.

The interruption of the counsel by the court during the argument, and the statement then made by the trial judge that he could not permit counsel to argue testimony that had been excluded from the jury, seems from the record to have related to what counsel was then saying as to Poore's character; but even if it related to the authority under which the appellant claimed to have acted the appellant can not complain of it, as the testimoney was incompetent, and the documentary evidence relating to it had been excluded from the consideration of the jury.

The testimony offered by the defendant relative to the alleged bad and dangerous character of Poore, and what the sheriff of Clinton county had told appellant when he authorized him to make the arrest, was properly rejected for several reasons, some of which will be inferred from what has been said already. Moreover, the testimony as to character, as shown by the avowal made at the time, did not relate to general bad charac-

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ter, but to bad character only; and if it had otherwise have been competent it was not brought within the well-settled rules of evidence regulating its admission.

It is evident that the verdict of the jury was based upon the reckless carelessness of the appellant in the use of a known deadly weapon. He had entered the house with it cocked; he recklessly, and with a seeming utter indifference to the safety of life, presented it, when cocked, at the deceased, being at the same time warned not to shoot; and hence the rejection of the testimony tending to show that the hammer of the gun would sometimes fall without the trigger being pulled, was not prejudicial to the defendant.

If the jury had believed from the testimony that the firing was deliberate and intentional, and not the result of a reckless use of the weapon, they could not consistently have convicted the appellant of manslaughter only. Moreover the gun with which the killing was done was not identified as the one as to which this testimony was offered.

It is unnecessary to review all of the instructions that were given or refused.

The jury were properly instructed as to the law of murder: and even if the instruction as to manslaughter committed in sudden heat and passion was somewhat abstract, yet it certainly was not prejudicial to the appellant.

The third instruction given to the jury, and which is the one mainly complained of by the appellant, reads as follows, to wit:

"Although the jury may not believe from the evidence, beyond a reasonable doubt, that defendant has been proven guilty of murder as set out in instruction No. 1, nor of shooting in sudden heat of passion or a sudden affray as set out in instruction No. 2, yet if they believe from the evidence, beyond a reasonable doubt, that the shooting and killing of Kilpatrick was accidental, and was done by defendant in the recklessly careless use or handling of a loaded deadly gun, then in his hands, they should find him guilty of manslaughter, and fix his punish-

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ment at confinement in the penitentiary for not less than two nor more than twenty-one years."

An instruction in substance similar to this one was given in the case of Christal v. Commonwealth, 9 Bush, 670, and was approved by this court; and the same rule has been announced in other cases. (Sparks v. Commonwealth. 8 Bush, 111; Wyatt v. Same, 2 Ky. Law Rep., 61.).

In this cause the appellant had the benefit of the converse of the above instruction, because the jury were told in the sixth one given by the court that if the gun was discharged accidentally, and not by reason of the careless and reckless use of it by the defendant, considering the place and the circumstances then surrounding him, they should acquit him.

The jury could not have inferred from the last-named instruction that to enable them to find the counter of it they had only to believe from the evidence that the weapon had been recklessly used by the appellant, because in the seventh instruction they were told that they must so believe beyond a reasonable doubt or they could not convict.

Instruction "D" asked by the defendant was properly refused. So much of it as was proper had already been given by the court, and it improperly singles out and gives undue prominence to particular circumstances which appellant claims were proven in the case.

It is urged, however, that the whole law of the case was not given, and that the jury should have been instructed as to involuntary manslaughter, for which our statute prescribes no penalty, and which is, therefore, governed by the common law, and is by it punishable with fine and imprisonment.

There was no evidence in this case, however, showing the existence of facts constituting involuntary manslaughter.

It has been said that it is the killing of another by one engaged in some unlawful act without an intention to kill such person, but if this be altogether correct, then it follows that if A unlawfully shoots at B, but, missing him, kills C, that it is

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only involuntary manslaughter in A, punishable with fine and imprisonment.

It seems to us that a better definition is given in Hale's Pleas of the Crown, when he says that "involuntary homicide is the death or hurt of the person of a man against or besides the will of him that kills him."

One must be presumed to intend the consequences of an act, reckless in its character of human life and committed under circumstances calculated to endanger it. If death results, it can not be properly said either that it was an involuntary homicide or a killing per infortunium.

The familiar illustration given in the text-books is, if one knowing that people are passing along a street, throw a stone from a house top, whereby death ensues, it will be manslaughter, because of the recklessness of the act, although he did not intend to hurt anyone.

In 1 Russell on Crimes, book 3, chapter 2, section 4, page 636, it is said:

"It has been shown that where, from an action unlawful in itself, done deliberately and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder; and it may be here observed that if such deliberation and mischievous intention does not appear (which is matter of fact and to be collected from circumstances), and the fact was done heedlessly and incautiously, it will be manslaughter. * * There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief, and the party committing them, and causing death by such conduct, will be guilty of manslaughter."

Mr. Wharton says: "Whatever may be the difference as to the degrees of homicide, a party whose negligence causes the death of another is in like manner responsible, whether the business in which he was engaged was legal or illegal. If the business was of such a character as to be felonious, the offense, it is clear, is murder. But even where the business is perfectly

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legal, negligence in the discharge of it when producing homicide is manslaughter."

It was properly said in the case of Christal v. Commonwealth, supra, that "to this general rule there may be exceptions, as where an act, careless in itself, is committed with fatal results under circumstances or at a place from which it might be reasonably inferred that no injury could happen from the carelessness of the party acting.

The case now under consideration does not come within the exception, and it may now be regarded as well settled in this State by numerous decisions of this court that when one does an act in such a reckless, careless manner that it is calculated to endanger human life, and death ensues, he is guilty of manslaughter, although the death of the person killed may not have been intended.

Judgment affirmed.

J. H. C. Sandidge and J. A. Brent for appellant.

P. W. Hardin for appellee.

DRAKE'S ADM'R v. SEMONIN & DIXON.

(Filed October 25, 1884.)

1. Pleading—Common counts—Curing defects—In an action for goods bargained and sold the petition must allege either that they were sold at defendant's instance and request or that he promised to pay for them. (2) But though neither of those allegations is made, the petition is good if the allegations or denials of the answer are such as require proof from plaintiff on the trial of such facts.

2. Denial by personal representative—In a suit against a personal representative on a claim against his decedent for goods sold, denial by the personal representative of knowledge or information of the sale is equivalent to a plea by decedent, if living, denying the sale.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Pryor.

The plaintiffs, Semonin & Dixon, were wholesale merchants and partners, and Paul F. Semonin and D. L. Drake were retail merchants. The latter purchased of the former goods,

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etc., and Paul F. Semonin having gone into bankruptcy this action was instituted against Drake, as surviving partner, on the account alleged to be due the plaintiffs. The only allegation made in the petition, after giving the style of the firm, is "that the defendants were merchants at Slaughtersville, Ky., and bought large bills of goods from the plaintiffs and made various payments. They say that the defendant's account closed with the 29th of October, 1875, at which time the defendant owed the plaintiffs the sum of $1,963.80, an account of which is filed as part hereof. The whole of this sum is due and unpaid, wherefore they ask judgment, etc."

A judgment was rendered for the plaintiffs against the personal representative of Drake, the latter having died before answer, from which this appeal is taken.

The administrator filed an answer in the usual form, denying the indebtedness, and that he had no knowledge or information in regard to the claim sufficient to enable him to form a belief as to its correctness, etc. He also filed an amended answer, in which he alleges that after the debt was contracted Drake sold out to Paul F. Semonin, and the plaintiffs agreed to accept Paul as the real debtor, and relieve Drake from all liability. And in a second amendment, that for a sufficient consideration the plaintiffs agreed to indulge Semonin for the payment of the debt, and, therefore, the intestate was released from responsibility. Issues were tendered on the pleadings, proof heard and the judgment rendered.

No demurrer or objection was made in the court below to the sufficiency of the petition, and the question is made for the first time on the appeal.

That the petition would be held bad on demurrer is manifest. This is not an action for goods sold and delivered by the plaintiff to the defendant, for if such an allegation had been made in the petition the law, from the sale and delivery of the goods to the defendant, would imply a promise to pay. Nor is it a good petition for goods bargained and sold, for then, without the delivery, it must appear that they were sold at the in-

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stance of the defendant, or that the defendant promised to pay. It required both parties to make such a contract, and to allege that plaintiffs bargained and sold is not equivalent to saying that the defendant agreed on his part to accept the goods, or that they were sold at his instance and request.

The substance of the petition is that the defendant is indebted to the plaintiffs in the sum of $1,963.30 for goods bought, the whole of which is due and unpaid. An averment that the defendant is indebted to the plaintiffs in the sum of $1,963 for goods bought of the plaintiffs by the defendant, and delivered to the defendant at his instance, would have been a good petition. Instead of demurring to the petition the defendant takes issue with the plaintiffs on the defective statements of his cause of action and says: "I deny that my intestate bought the goods or that he is indebted to you in the sum of $1,963 for goods bought, or in any other sum. On that issue the proof shows the sale and delivery of the goods by the plaintiffs to the defendants and their value. The mode of pleading by the personal representative as to his want of information and knowledge is equivalent to a plea by the decedent, if living, denying that he purchased the goods of the plaintiffs.

The answers are filed in this case on the idea that all the essential allegations have been made by the plaintiffs in order to create the liability, and the record shows that all the facts necessary to a recovery were in issue and established by the plaintiffs. The rule is: "When there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been fatal on demurrer, yet if the issue joined be such as necessarily requires on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." (Chitty's Pleadings; Bliss on Code Pleading; Newman's Pleading and Practice.)

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It is often difficult to apply this rule, and to make the proper distinction between cases where the cause of action is defectively stated, and where there is a total omission to state a cause of action, or the absence of an averment constituting the foundation of the plaintiffs' right of recovery.

In Wilson v. Hunts' Adm'r, 6 B. Monroe, 379, it is said: "When the verdict can be fairly considered as establishing between the parties the very fact which should have been, but is not, prescisely averred in the declarations, and especially when it clearly appears that the particular fact was understood by the parties to be the point in issue to be decided by the jury, it would be unnecessary for the ends of justice, and would be more than useless to remand the case that it should again be presented for the consideration of the jury." The better rule, and in fact the one recognized by all the elementary authorities on the subject of pleading, including Mr. Chitty, is that when there is a total omission to state a cause of action, or some fact essential to the cause of action has been wholly omitted, the verdict will not cure the defect.

There is something more, however, in this record coming to the aid of the petition than the verdict of the jury. The personal representative, by his answer, denies, first, the existence of the partnership between his intestate Drake and Paul Semonin; second, he has no information or knowledge sufficient to enable him to form a belief as to the purchase of the goods by the firm or its liability therefor; nor has he such knowledge as to the truth of the averment that said account remains unpaid; third, after the debt was contracted his intestate sold out to Paul Semonin, who assumed the firm debts, and the plaintiff agreed to look to Paul for payment.

The denial of the purchase of the goods by the firm placed in issue the fact as to whether the goods were bought at the instance and request of the firm. This denial necessarily involved that issue, and the general denial filed by the administrator, as authorized by the Code, placed the burden on the appellees of showing every fact necessary to a recovery. First,

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they were required to show a partnership between Drake, the appellant's intestate, and Paul Semonin; second, the sale of the goods to the firm at their instance, and the prices agreed to be paid or their value. So there was an issue formed by the pleadings that necessitated all this proof in support of appellees' claim. Besides, it is attempted to be shown on the issue raised by the amended answer, to which there was a reply, that appellees agreed to look to Paul Semonin for this debt (appellant's intestate having sold out to him), and to release the intestate from all liability.

A plea in the nature of a compromise of the debt and avoiding payment by alleging that some one else had assumed to pay it by the consent of or at the instance of the plaintiffs. While this plea made by the personal representative would not shift the burden on the administrator after he had made a general denial, still it shows the character of the issues the court or jury was called to try and the proof necessary to authorize the recovery. Parker, Justice, says in 9 Pick.: "When the defendant chooses to understand the plaintiffs' count to contain all the facts essential to his liability, and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he seems thus purposely to have omitted to notice in the outset of the controversy." So in this case we have not only the verdict of the jury or the judgment of the court for the plaintiff, but we have issues distinctly presented by the pleadings, placing in issue all the material facts necessary to be established by the plaintiff before he was entitled to the judgment. The facts developed by the record establish the plaintiff's claim, viz., the partnership between the intestate and Paul Semonin; the sale and delivery of the goods by the plaintiffs to that firm and the non-payment. The amended answer offered to be filed in the year 1881 presented no defense to the action, and if it did there was no

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proof in support of it. The action had been pending for three years, and this amended pleading offered contains no other allegations than that Paul Semonin had assets enough after he purchased out the intestate to pay all the firm debts, and had agreed to do so; that the plaintiffs knew this fact and caused Paul to pay other debts with the firm assets, when they should have been applied to the debts of the firm; that this was done with a view of making the intestate pay the debt. After Paul had purchased out the interest of Drake the goods and the proceeds belonged to him, and he had the right to apply the money or the goods to the payment of his own debts in the absence of some agreement with the plaintiffs that precluded them from accepting the money in that way. The judgment below must be affirmed.

Cook & Towery and Petrie & Littell for appellants.

W. P. D. Bush, D. H. Hughes and M. C. Givens for appellees.

MANN v. MARTIN'S ADM'R, &c.

(Filed October 4, 1884.)

1. Sheriff—Sureties—Deputy—Pleading—A, whose property had been illegally seized, sued the sheriff and his sureties without alleging any breach of the covenants of the bond or that the sureties had actually abetted or approved the seizure. Held—No cause of action was stated against the sureties. (2) The sheriff is liable for a seizure made by anyone who, though not legally appointed deputy in writing, yet habitually acts as such with the sheriff's knowledge.

2. Judgment—Evidence—Judgment rendered in an action between plaintiff and parties other than defendant, adjudging plaintiff to be the owner of the property seized, is not competent evidence to prove that plaintiff did own the property.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

The appellant, Mrs. V. R. Mann, brought this action against the administrator of John Martin, Sr., deceased, and the sureties of said decedent upon his official bond as sheriff, for damages for the alleged wrongful seizure of her property by his

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alleged deputy under an order of delivery that was issued in a suit of Lane & Bartlett against her husband, Wm. B. Mann.

Two trials have been had in the lower court, and the case has been once in this court.

Upon the first trial below the court was of the opinion that the appellant could not maintain the action because, in its opinion, the judgment of the Louisville Chancery Court making her a feme sole was void; and for the further reason that, although when the property was seized and taken out of her possession, she had delivered to the sheriff an affidavit, stating that the property belonged to her and was in her possession, yet she had failed to state therein that she was entitled to the possession. (Civil Code, section 191.)

This court upon appeal decided otherwise upon both points, as will be seen by reference to Mann v. Martin, Adm'r, &c., 14 Bush, 768.)

Upon the return of the cause the defendants were permitted to file an amended answer in which it was alleged that the alleged deputy, who had seized the property, had never been legally appointed and had never qualified as such; and it being so shown upon the second trial, the court below peremptorily instructed the jury to find for the defendants; and the appellant now seeks a reversal of the verdict and judgment so obtained.

The action is in tort, and although the personal representative of the deceased sheriff and the sureties upon his official bond are the persons sued, yet the petition fails to to set out the covenants of the bond or any breach of them; and it is not shown that any of the sureties aided, abetted or approved the seizure of the property, nor is it so alleged in the pleadings of the plaintiff.

Inasmuch as the obligors in the bond are the persons sued, it was doubtless the intention to sue upon it; and the action, at least to some extent, seems to have been so regarded and treated. In fact this court upon the former appeal so spoke of it; but no questions were then raised or decided, save the two alluded to above.

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It necessarily results from what has been said that the judgment below was proper as to the defendants, who were sureties upon the sheriff's bond.

This, however, does not hold true as to the sheriff. During the trial below, and after the testimony had developed the fact that the person who had seized the property was neither a legal deputy of the sheriff nor a special bailiff, the plaintiff offered to file an amended petition, the first clause of which alleged that such person was acting as deputy by the authority and direction of the sheriff, John Martin, Sr., and so acted in executing the writ under which the property claimed by the appellant was seized.

The court rejected it. In view of the fact that after the return of the cause from this court the trial judge had permitted the defendants, over the objection of the plaintiff, to file the amended answer, alleging that the person who had seized the property was not a deputy, he should, in the exercise of a sound discretion, have permitted the first paragraph or clause of the amended petition to be filed.

The testimony already offered tended to show that the person who had seized the alleged property of the appellant was in the habit of receiving and executing process with the knowledge of the sheriff, and in fact by his authority and direction, and had general authority from him to do so.

It was competent to show this, and that the person who seized the property acted as a deputy by parol (Grable v. Froman, 1 A. K. Mar., 191); and the sheriff, by such consent and action upon his part, made such person, in contemplation of law, his representative, because an actor in the transaction; and if the appellant illegally sustained damage thereby, said sheriff was, and his estate is, responsible, and this view of the case, with the question as to the ownership of the property, should have been submitted to the jury by proper instructions.

As the case must be tried again it is proper to determine a question of evidence presented by this appeal.

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Upon the trial below the appellant offered as evidence the judgment in the case of Lane & Bartlett against her husband, Wm. B. Mann, and to which she was a party, and by which the property that had been seized by the acting deputy sheriff was adjudged to belong to her. The appellees were not parties or privies to said suit and the objection to the judgment as evidence in this cause was that it was res inter alios acta.

Obviously the general rule that one ought not to be bound by a proceeding to which he is a stranger is correct; but there are exceptions to it, as when a judgment is used in evidence by way of inducement or to establish a collateral fact; thus a judgment against a sheriff for the misconduct of a deputy may be used as evidence by the sheriff in an action by him against the deputy as to the same transaction, to show that there was a judgment, and for the cause alleged; but it can not be used as evidence to show the misconduct of the deputy. (1 Greenleaf on Evi., section 527.)

But in this instance the judgment was offered, not simply to show that there was one, but for the purpose of proving ulterior facts, to-wit, the alleged ownership of the appellant of the property and its value. It was, therefore, not competent testimony, and the lower court properly excluded it.

The judgment is affirmed as to all of the appellees, save John M. Martin, administrator of John Martin, Sr., as to whom it is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

M. Munday and R. B. Hawkins for appellant.

C. B. Seymour and John W. McGee for appellees.

KENTUCKY SUPERIOR COURT.

RASH v. HOLLOWAY.

(Filed October 22, 1884.)

Constitutional law—Peddler's licenses—All peddlers are required (by General Statutes, chapter 84) to have a license; a subsequent act exempts those peddlers who are citizens of this State and sell only goods made here. Held

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—This is a discrimination in favor of the citizen and products of this State as against those of other States, and is in violation of the Federal Constitution. One being exempt from the license all must be.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Richards.

Chapter 84 of the General Statutes declared all itinerant persons vending goods, wares, etc., to be peddlers, and required them to procure a license, for which they were to pay according to the territory in which the business was to be conducted. A subsequent provision declared all contracts made by peddlers, "without the license required by law," to be void (Chapter 99, article 8, section 6). By an act approved February 21, 1784, it was provided "that itinerant persons, who are citizens of this State, and who vend exclusively goods, wares and merchandise which are the growth product or manufacture of this State, shall not be deemed peddlers, nor required to take out license." The pleadings in this case admit that the note sued on was given for lightning rods manufactured in the State of Illinois, and sold by an itinerant person who was not a citizen of this State. The question is, was the contract void by reason of the fact that the vendor had not procured a peddler's license?

The Constitution of the United States has vested congress with the exclusive power of regulating commerce between the several States, and has declared that citizens of each State shall be entitled to all the immunities and privileges of the citizens of the several States. It has been uniformly held by the Supreme Court of the United States that these provisions prohibit a State from imposing burdens by way of taxation upon persons who are citizens of other States that are not imposed upon its own citizens, or upon goods manufactured in other States that are not laid upon goods of its own manufacture. (Woodruff v. Parham, 8 Wall., 123; Ward v. Maryland, 12 Wall., 418; Welton v. State of Missourii, 91 U. S., 275; Guy v. Mayor and City Council of Balt., 100 U. S., 434; Webber v. State of Va., 103 W. S. R., 344; Ward v. State of Md., 102 U. S., 204; County of Mobile v. Kendall, 102 U. S., 691.)

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In Ward v. Maryland the court say: "Inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose to sale, within the district described in the indictment any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law from such permanent residents."

In Welton v. State of Missouri the court say: "A tax for a license to sell goods is in effect a tax on the goods authorized to be sold. A law which requires a license to be taken out by peddlers who sell articles not produced in the State, and requires no such license of those who sell in the same way articles which are produced in the State, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several States."

In Daniel v. Trustees of Richmond, 78 Ky., 542, the Court of Appeals of Kentucky applied these principles to an ordinance under the town charter of Richmond, which fixed the license of auctioneers and salesmen at $5 for residents of Madison county and $10 for nonresidents. In deciding its provisions to be void the court said: "The effect of the objectionable features of the charter is to drive competition from the market in Richmond, save as between citizens of Madison county, under the discriminations of a law which, however concealed in its forms or denominated by its advocates, contains the very substance of inequality of privileges and immunities and of commercial regulations forbidden by the provisions of the Constitution before mentioned."

But these principles do not render the aforesaid act of February 21, 1874, unconstitutional. The legislature had the power to declare that citizens of this Commonwealth engaged in vending the products of this State should not be compelled to pay a peddler's license.

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What then was the effect of this statute? That it is a repealing statute is beyond question. Before its passage all itinerant persons vending chattels, whether the product of this or another State, were required to procure a peddler's license. By its express provisions it is unnecessary for citizens of this State to take out license to vend the products of Kentucky. But to exempt the citizens and products of this State operates as an exemption of the citizens and products of all States. It follows, therefore, that the act of February 21, 1874, must be construed as repealing in toto the provisions of the General Statutes requiring peddlers to procure a license. This conclusion does not involve the validity of a statute, but simply gives, by construction, the proper effect to the repealing act.

C. Gillespie & Co. had the right to peddle their goods in Kentucky, and their contracts are not void simply because they had not taken out a peddler's license; and the circuit court erred in adjudging the contrary.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the third paragraph of the defendant's answer and for further proceedings consistent with this opinion.

Thos. E. & E. C. Ward for appellant.

R. H. Cunningham for appellee.

COVINGTON v. MORTON, &c.

SAME v. NORTON, &c.

(Filed September 22, 1884.)

1. Limitation—Cause of action, time of accrual—Spurious bond—A sold B a bond of the county of W. A similar bond was afterwards discovered to be spurious, and B thereupon brought suit against the county to determine the genuineness of his bond and found it, too, to be spurious. He then sued A on the implied warranty of genuineness. A pleaded the statute of limitation. Held—The right of action accrued immediately at the date of sale, and the statute began to run then, and not merely from the time the bond was judicially declared to be spurious.

2. Agent—Limitation—The bond was sold, not by A in person, but by his broker, and B did not discover A as the principal until long afterwards. Held—This does not postpone the running of the statute so as to make it begin only from the time of such discovery.

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Appeal from Louisville Chancery Court.

Opinion of the court by Presiding Judge Ward.

These two cases depend, for the most part, on the same question, and will be considered together, and the questions affecting the second and not the first, which, in the opinion of counsel, are important will be afterwards referred to.

These suits were instituted on the 28th day of May, 1881, by appellant to recover from each of the appellees the amount paid to them respectively, more than five years next before that date, for a bond of $1,000 due in ten years from date, with coupons attached for semi-annual interest at 10 per cent. per annum, purporting to have been issued by Warren county, Kentucky, the appellees in each case having sold and delivered to the appellant one of said bonds.

Shortly after the sale and purchase of said bonds it was claimed that they were spurious; that the name of the county judge of Warren county, H. K. Thomas, was not his signature; that the same was a forgery, and that said bonds were not binding or of any value. This claim seems to have been notorious, and to have excited, justly, great public interest. Appellant, claiming that he did not know whether said bonds were, or were not, genuine, and the testimony relative thereto being, as he conceived, conflicting, caused the broker, through whom he had purchased, to notify each of the parties from whom he had purchased that "the county judge, Hon. H. K. Thomas, asserts that all Warren county bonds over No. 255 have not been properly issued; and that we take this early opportunity of informing you of this assertion, so that you may be prepared to refund us the money for bond No. 276 [No. 275] should said bond be decided to be spurious."

This notice was given immediately after the forgery was made known, and was received by due course of mail by the parties from whom the purchases were made.

Appellant says "that, acting upon the belief all the time that said bond was good and genuine," he, in good faith, on the — day of April, 1877, in conjunction with a number of other

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persons, brought suit against Warren county to test the validity of these bonds, and that it was decided that they were not, by the court in which said suit was brought, and that judgment was affirmed by the Court of Appeals in October, 1880.

Each of the appellees, among other defenses, plead and relied upon the statutory bar of five years. To avoid this it is claimed for appellant that his right of action did not accrue until it was finally decided by the Court of Appeals that the bonds were not genuine. That until it was decided by a court of competent jurisdiction that the bonds were spurious, he could not know that they were; that before that he could, at best, have only a suspicion; that the fraud or mistake was not discovered until the fraud in the issuance of the bonds was made manifest, and that the case is, therefore, within section 6, article 3, chapter 71 of the General Statutes.

This argument, though specious, is not sound, nor can it be reconciled with adjudged cases. It confounds the time when the right of action accrued with one of the facts, or the fact, upon which the action was to be determined. It is admitted in argument that it was, at least, the duty of appellant to notify appellees, within a reasonable time after the bonds had been questioned, that they were so questioned; and we understand that it is admitted further that so soon as said bonds were questioned the appellant might have instituted his suit, and in that suit have recovered the price paid for the bonds, if it had therein been shown, as it was in the other suit, that the bonds were forged.

But the question, as we understand it, is not an open one in this State, and no matter how it might be reasoned out, or how it has been settled in other States, if the Supreme Court of this State has established a rule that is conclusive upon this court.

In the case of Payne v. Rodden, 4 Bibb, 304, the facts were that Rodden sued Payne to recover the sum of $93 paid to him for a horse which Payne had sold him, but which horse was not in fact the horse of Payne, but the property of Allen & Williams. There was no allegation that Allen & Williams

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had recovered the horse, by a judgment or otherwise. The court says: "The implied warranty of title is not of the character supposed in argument, which requires a recovery of the goods by the right owner before an action can be maintained by the purchaser, but it is in the nature of an implied undertaking on the part of the seller, that the commodity he sells is his own; and in an action upon such an undertaking it is a sufficient breach to allege that the property belongs to some other."

In the case of Scott v. Scott's Adm'r, 2 A. K. Marshall, 217, the facts were these: Defendant's intestate sold plaintiff a slave, which at the time of the sale belonged to Elizabeth Robertson, and which she recovered from the plaintiff in a suit brought against him, and so plaintiff sued for the price paid for the slave. Defendant relied upon the statute of limitation. The suit was instituted more than five years after the purchase, but within less than five after the recovery by Elizabeth Robertson. The court says: "It is certainly true that the statute could not have begun to run until the cause of action accrued; and if, as was contended on the part of the plaintiff, the recovery under an adverse title was essential to give him a right of action, it would follow, as a necessary consequence, that the instruction given by the court to the jury was erroneous.

"But it can not be admitted that the recovery was necessary to the plaintiff's right of action. * * *

"If such an averment," that is, that there has been a recovery, "be unnecessary, it must be because the vendee's right of action does not depend upon the recovery, and of course he need not wait until a recovery is had before he commences his action. We accordingly find the doctrine so settled in the English books (1 Bac. Abr., title Action on the Case, letter D, and the cases there cited). It was, therefore, held in that case "that the plaintiff's cause of action accrued on the sale and delivery of the slave, and that the circuit court correctly instructed the jury that the statute of limitation began from that time to run." The case of Chancellor v. Wiggins, 4 B. Monroe, 201, was an action of assumpsit upon the implied

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warranty of title in the sale of two negroes as slaves, who afterwards recovered their freedom. The action was instituted more than five years after the sale, but within less than five after the negroes established their right to freedom. Held—That the plaintiff could not recover, and the cases above, and that of Chism v. Wood, Hardin, 531, cited as authority. In Tipton v. Triplett, 1 Met., 572, Tipton sued Triplett on a note for $1,000. One of the defenses was that the note was given as the evidence of the agreed price for two slaves; that the sale had been made with a warranty of title, and that the plaintiff had no title to the slaves at the time of the sale. The court says:

"The pleadings render it somewhat uncertain whether the purchaser relied upon an express warranty of title or upon the warranty of title which the law implies on a sale of chattels in the possession of the vendor. If it meant an express warranty of title, no cause of action accrued upon it until the slaves were taken from the purchaser by the real owner; and as the defendant did not allege that any other person had asserted title to the slaves, or that his possession of them had been disturbed, he failed to show any breach of the warranty.

"If, however, it can be construed to mean an implied warranty, or rather an undertaking on the part of the vendee, that he had title to the slaves, which is the warranty that the law implies where there is no express warranty of title, then there was an immediate breach of this implied undertaking, if in fact the vendor had no title at the time of the sale."

Daniel on Negotiable Instruments, section 1675, volume 2, says:

"Bank notes, being payable to bearer, are transferred by mere delivery; and although it has been thought that the transferrer may indorse them, with like effect as the indorsement of other negotiable promissory notes, it would be exceedingly singular to do so, for bank notes in their nature are designed to circulate like money, not upon the credit of the transferrer, but upon their own credit as obligations redeemable in money at any time. Being used as money, it is quite clear and well settled that the person who transfers a bank

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note in payment of a debt, or otherwise for value in the course of business, warrants it, in like manner, as his transfer imports a warrant of current coin, that is, that it is genuine and not counterfeit. If it be counterfeit and spurious, it is not what his very act of transfer represents it to be. It is a mere nullity instead of money or cash; and the debt remains undischarged."

The same author in the next section lays down the rule that in order to maintain an action the party must take diligent steps to notify the transferrer that the paper is spurious.

So if the paper is a mere nullity and if immediate notice must be given and return offered and restitution demanded, it would seem that the right of action more certainly accrues at the time of the transfer, or there are more reasons why it should than in the sale of an ordinary chattel.

We are of the opinion that the apellant's right of action accrued instantly on the transfer of the bonds, and that it was barred before these actions, or either of them, were instituted.

But it is insisted that the statute does not apply in the case against Norton & Co., because in that case the purchase was made from one Galt, who was acting as the agent of Norton & Co., and he did not disclose his agency, and the fact that he was agent for appellees was not known to appellant until a short time before the institution of this suit.

The rule is correctly stated by appellant, that on discovering that Galt was acting for another he had the right to elect to which he would look, whether to Galt or his principal. But having elected, this would not change the time when his cause of action accrued. If the principal was guilty of conduct which in law amounted to an obstruction of appellant's power to sue, the statute would not run during the time of such obstruction. But do the allegations of appellant's reply show any obstruction? He says: "That at the time of the said purchase the said Galt failed to disclose for whom he sold said bond." * * * Again the reply says: "That on or about the 14th of April, 1881, he wrote to said Galt, inquiring for whose account he had sold the bonds herein, and was informed

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by the said Galt that he had sold it on account of these defendants; that not until so informed by the said Galt was he aware, or did he know, that the said bond had been sold by the said Galt for the defendants."

According to the reply no effort was made by appellant to find out whether Galt was acting for himself or another until more than five years after the transaction with Galt. The party trading with an agent, for an undisclosed principal, can not treat the agent as principal and thereby prolong the time within which he can sue the principal. If he should make reasonable efforts to find out who was the principal, and such efforts were obstructed by the principal's conduct or directions, the statute would not run during the time of such obstruction, but that is not this case. It is true there is some proof conducing to show such a state of fact in this case, but as no issue of the kind was made in the pleadings we can not consider the proof. It is evident that appellant acted upon the assumption that his right of action did not accrue against Galt or his principal until the bonds were adjudged spurious, and, therefore, misjudging his rights, lost his claim against appellees.

The judgments in both cases are affirmed.

Arthur M. Rutledge, James S. Ray and R. W. Covington for appellants.

A. P. Humphrey, W. O. & J. L. Dodd and Goodloe & Roberts for appellees.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Acknowledgment—See Homestead, 3.

Assignment for Benefit of Creditors—

Construction of deed—Although there may be some question whether, if rigidly construed, a contract entered into by the creditors of a failing debtor, by which it was agreed that the estate of the debtor should be assigned to a trustee for the benefit of creditors, extends to and embraces the real property of the debtor, yet as it is manifest that the creditors entered into the agreement upon the faith and belief that all the property of the debtor was to be taken possession of by the assignee and divided amongst all the creditors pro rata, whatever technical advantage one of the creditors may have acquired by a sale of the real estate of the debtor under execution should be shared by all the creditors alike. Dickinson, &c. v. Beahr. November 13, 1884. Garrard Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Anderson & Herndon for appellants; Denny & Tomlinson for appellee.

Attachments—

1. For rent—An order sustaining an attachment for rent, and directing a sale of the attached property is a final order, therefore, where the defendant has executed bond for the delivery of the property and the attachment has been sustained he can not, in response to a rule against him to produce the property, deny his tenancy or his liability for rent as stated in the attachment; this must be done before the attachment is sustained, if at all.
2. Affidavit—The affidavit for the attachment in this case was fatally defective in that it omitted the averment "that the affiant had reasonable grounds to believe" that unless an attachment issued he would lose his rent. A simple averment "that he believes he will lose his rent" is not sufficient; but the want of the omitted averment did not make the proceeding void, but simply erroneous, and as the order sustaining the attachment is not appealed from the court has no power to revise it. Crabtree, &c. v. Johnson, &c. November 14, 1884. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Owen & Ellis for appellants; Little & Slack for appellees.

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Attorneys—

1. Employment—Where one of several defendants sued jointly employed counsel for all, and the others being informed of such employment accepted the services of the counsel thus retained, they are as much liable as if they had made or authorized the employment in the first place. Rarrick, &c. v. Clay, &c. November 12, 1884. Henderson Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Yeaman & Lockett for appellants; S. B. &. R. D. Vance, W. P. D. Bush and Finlay F. Bush for appellees.
2. Demand—Limitation—Where an attorney receives money as for his client, which he knows belongs to another, the act of receiving is wrongful, and no demand of the attorney by the party entitled is necessary. Limitation begins to run when the wrongful act is done. Mowery v. Webb. November 19, 1884. Henry Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff., Ward, P. J., dissenting. Geo. C. Drane for appellant; Carroll & Barbour and R. W. Masterson for appellee.

Bankruptcy—

Effect of discharge—A discharge in bankruptcy does not release the debtor from liability for a debt due the Commonwealth, and by reason of the relation of the counties to the State the surety in a county levy bond, against whom judgment has been rendered in the name of the Commonwealth for the use of the county, is not released from liability therefor by a discharge in bankruptcy. Mason, &c. v. Commonwealth, For, &c. November 20, 1884. Henderson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Clay & Banks for appellants; Yeaman & Lockett for appellees.

Bonds—

Surety—While a party can not be both the payee and payer of a bond, the fact that a surety in a bond taken in a legal proceeding is one of the beneficiaries in the bond does not invalidate it, the officer taking the bond having no notice of that fact. Crabtree, &c. v. Johnson, &c. November 14, 1884. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Owen & Ellis for appellants; Little & Slack for appellees.

Claimant's Bond—

Defenses—Upon the trial of a motion for judgment upon a bond executed by the claimant of property levied on under a distress warrant the obligors can not defend upon the ground that the tenant did not owe the rent. The warrant is conclusive as to the amount due, and the only issue to be tried is whether or not the property was subject. Allen v. Thompson. November 26, 1884. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. R. W. Slack for appellant; Owen & Ellis for appellee.

County Courts—

1. as a general rule, when reference is made to a county court or the action of a county court, it means a court presided over by the county judge alone, and should be held to so mean when used in connection with fiscal matters, if it relate to mere ministerial duties.

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2. Where the direction of the legislature to the county court to do ministerial acts is imperative, it is immaterial whether the acts are done by the county judge alone or by him and the justices.
3. An innocent holder of bonds issued by a county to a railroad company is not bound to look to the delivery to the county of the stock certificates.
4. An act requiring the county court to submit to a vote the question whether the county shall subscribe to the stock of a railroad company is not unconstitutional, although it requires the court to submit to a vote any sum, however large, that the railroad company may name. The voters have a right to accept or reject it, as they please.
5. A county having levied and collected a tax to pay the interest coupons attached to bonds issued by it, and obtained an act to authorize it to levy and collect a tax to enable it to purchase the bonds, before their maturity, from the holders, and by virtue of the act levied and collected a tax for that purpose, is estopped to deny the validity of the bonds or coupons.
6. The legislature, having created a fund by taxation for a special purpose, has the power to limit the use of the fund to that purpose.

   The legislature having authorized a county court to levy a tax for the purpose of raising a sinking fund to be used alone in the purchase of the principal of certain bonds of the county, the holders of interest coupons attached to the bonds can not attach the fund thus created and subject it to the payment of their claims.
7. It is a fundamental doctrine of garnishment that the plaintiff does not acquire any greater rights against the garnishee than the defendant himself possesses.

   As the county could not have ordered the treasurer of the financial board, the garnishee in this case, to apply the money to a different purpose from that provided by the legislature, the plaintiffs have no greater rights than the county authorities had as to it.
8. A county in subscribing to the stock of a railroad company does not act as to a governmental use or trust, and with reference thereto is to be treated as a quasi private corporation.
9. In the absence of a statutory provision judgments against municipal corporations are to be enforced by execution against the strictly private property of the corporation, but not against property owned or used by the corporation for public purposes. Cook v. Lyon County. Same v. Same. Thompson v. Same. November 20, 1884. Lyon Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. John Feland for appellants; W. Lindsay for appellee.

Decedent's Estate—See Fraudulent Conveyances, 1, 2.

Deeds—

Reformation—Where the purchaser of land intended that the vendor should convey the fee simple title thereof to his wife, and the vendor by mistake conveyed only a life estate to the purchaser's wife, remainder to his children, upon the petition of the purchaser and his wife against

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their children the chancellor had the power to reform the deed. Brown, &c. v. McConn, &c. November 29, 1884. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. C. T. Atkinson for appellants; John A. Fulton for appellees.

Devise—

1. Construction—Testator devised land to a son "during his life and after his death to his heirs at law, to be by him and them possessed and enjoyed forever." There was nothing in the balance of the will to explain this clause save that the devises of land to all of the other children of the testator were for life only, with remainder to their children respectively.

   Held—That the son took a life estate and his children the remainder. McClary, &c. v. Bridges. November 1, 1884. Allen Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. John J. Gatewood for appellants; Rodes & Settle for appellee.

2. Construction—A testator devised land to trustees for the use of his daughter during her life, and at her death they were to hold the land for the use and benefit of her issue upon the same terms and trust "so far as applicable." Held—That the children of the daughter of the testator ought not to be deprived by implication of the power of alienation upon the idea that they took only a life estate and their issue the remainder, the intention of the testator being involved in much doubt. Moore, &c. v. Ormsby, &c. November 15, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. W. O. & J. L. Dodd for appellants; James S. Pirtle for appellees.

Discovery—See Pleading, 1.

Evidence—

Adding to written agreement—Where both parties to a written agreement say that the writing does not contain the true agreement, the chancellor can add to or vary the stipulations as the testimony may authorize. Honaker, &c. v. Buckley. November 1, 1884. Pike Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. York & Ferguson for appellants.

Executions—

1. Private sale—A sheriff has no authority to make a private sale under execution, and such a sale is held to have passed no title to the purchaser as against the landlord's claim for rent. Allen v. Thompson. November 26, 1884. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. R. W. Slack for appellant; Owen & Ellis for appellee.
2. Sale—The plaintiff in an execution, who had become the purchaser at the execution sale, accepted payment of the amount bid by him before the making of a deed to him by the sheriff, and subsequent to the making of the deed he transferred his interest in the property to R. Prior to the transfer to R., and prior to the execution of the sheriff's deed, the execution defendant sold and conveyed to H., who sold and conveyed to G., reserving a lien for unpaid purchase money. In an action by H. to enforce his lien, G. defended upon the ground that the title of H. was defective be-

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cause of the execution sale, and R. claimed the property by reason of the transfer by the execution plaintiff to him. Held—That the execution plaintiff, having accepted payment of his debt, was not entitled to a deed from the sheriff, and R. stood in no better position, because at the date of the transfer to him, and when the execution plaintiff obtained his sheriff's deed, H. had the legal title to the property. R. was, therefore, not entitled to judgment. Henrix, &c. v. Moore, &c. November 15, 1884. Fleming Cir. Ct. Opin. by Holt, J., Ct. Ap., rev. B. D. Lacey and Reid & Stone for appellants; M. M. Teager and W. H. Cord for appellees.

Fraudulent Conveyances—

1. Return of "no property"—As a general rule an action in equity to set aside a conveyance as fraudulent can not be maintained until there has been a judgment at law and return of "no property," and this rule applies as well when the debtor is dead as when he is living, the legal remedy being as ample against the estate in the hands of the personal representative as against the estate of the living debtor.
2. If the creditor is properly in equity for any purpose he may attack the conveyance as fraudulent without having judgment and return of "no property," but the statute which authorizes an action in equity against "heir or devisee" to subject any property "descended or devised," does not apply to property held by conveyance. Anderson, &c. v. Avery, &c. November 29, 1884. Lou. Ch. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. E. E. McKay and W. Lindsay for appellants; Russell & Helm, Bullock Andersen, and W. O. & J. L. Dodd for appellees.

Frauds, Statute of—

Verbal gift—A verbal contract for the sale of an interest in real estate is not void for use as a defense, although the remedy to enforce its specific performance has been taken away by the statute.

A suit, in the nature of a bill of discovery, was brought against a debtor and his three sons, alleging that the sons had property in their possession belonging to the father; the wife of the debtor subsequently died, and an attachment was issued in the same action and levied upon the life estate of the debtor in land that had belonged to his wife. One of the sons, who was in possession of the land, filed an answer, claiming the life estate by reason of a verbal contract between him and his father prior to the death of his mother.

Held—That the fact that the creditor's suit was pending prior to the death of the debtor's wife did not create any lien in the creditor's favor upon the husband's life estate; and that the alleged verbal contract between the debtor and his son would be available as a defense were it satisfactorily established by the testimony, which the court holds is not done. Hite, &c. v. Hise. November 29, 1884. Lou. Ch. Ct. Opin. by Holt, J., Ct., Ap., aff. Russell & Helm, Mix & Rogers for appellants; Chenault & Colston for appellee.

Garnishee—See County Bonds, 7.

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Homestead—

1. Widow—The unexecuted intention of a widow to occupy and claim land of her deceased husband as a homestead does not exempt it from the payment of the husband's debts. Hicks, &c. v. Soaper. November 22, 1884. Henderson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Sol. S. Sizemore for appellants; A. T. Dudley for appellee.
2. Purchase money—No homestead exemption exists as against a note executed for money advanced to pay the purchase price of land; therefore, in an action to foreclose a mortgage executed for money so advanced it is unnecessary to determine whether the mortgage was duly executed and acknowledged so as to pass the homestead, as no homestead could, with or without the existence of the mortgage, be asserted and maintained. (Judgment reversed for failure to allow a credit.) Miller v. Jones. November 1, 1884. Butler Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. B. L. D. Guffy and John L. Scott for appellant; Thos. P. and Wm. Wand and E. W. Hines for appellee.
3. Acknowledgment—The right to a homestead having been made an issue by the pleadings in an action to foreclose a mortgage to which the wife of the mortgagor was a party defendant, and determined adversely to the claimant by the judgment, it is too late for the wife to raise the question as to the sufficiency of the acknowledgment. Turley v. Vanarsdale. November 29, 1884. Washington Cir. Ct. Opinion by Pryor, J., Ct. Ap., rev. Bell & Wilson for appellant; W. C. McChord for appellees.

Homicide—

Homicide to prevent felony—Upon the trial of the appellant for murder the court properly instructed the jury that if the defendant was called in to protect the family of his uncle from the assaults of the deceased, and to prevent the deceased from committing a rape upon the little daughter of defendant's uncle, and believed, or had reasonable grounds to believe, that the deceased at the time was about to commit a rape upon the person of the child, he had the right to use such means as was necessary to prevent the felony or the infliction of great bodily harm; and if he acted in good faith for that purpose, and not with a malicious intent, they must acquit. Roe v. Commonwealth. November 22, 1884. Madison Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Chenault & Parrish for appellant; P. W. Hardin for appellee.

Infant's Real Estate, Sale of—

Failure to appoint guardian ad litem for infant—Prior to the passage of the act of January 16, 1882, authorizing the clerk, when an infant defendant is under the control of the party suing, to appoint a guardian ad litem, it was necessary to resort to the ancient practice of actual service on the infant and the appointment of a guardian ad litem to defend; but the infant having been brought into court by the actual service of process, the failure to appoint a guardian ad litem was only erroneous,

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and did not render a judgment for the sale of the infant's real estate void, but voidable. Schuk, Gd'n, &c. v. Stoll, &c. November 29, 1884. Campbell Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. J. Creutz for appellants; John S. Ducker for appellees.

Judgments—

Consent judgment—A consent judgment can only be called in question, if at all, by some of the means recognized by law. It can not be supplemented by agreements not a part of it, unless attacked for fraud or mistakes, and in the mode prescribed by law. Cord v. Hendrick. Tabler v. Cord. November 26, 1884. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. W. H. Cord for Cord; W. J. Hendrick for Hendrick and Tabler.

Judicial Sales—

Purchase by commissioner—A commissioner in chancery can not become a purchaser at his own sales or reap any benefit from a purchase by another under an agreement that he is to be regarded as a joint purchaser. Such contracts are against public policy, and it is immaterial whether the suit is by the debtor to set aside the sale or by the commissioner to enforce the contract as against his co-purchaser. Bagby, &c., v. Eversole, &c. November 15, 1884. Perry Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. Lindsay and G. W. & B. F. French for appellants; John L. Scott for appellees.

License—

Liquor dealer—A wholesale liquor dealer who sells whisky by the pint without license incurs the penalty denounced by the act of May 8, 1884. Commonwealth v. Rosenbaum. November 21, 1884. Jeff. Ct. of Com. Pleas. Separate opinion by each member of Sup. Ct. rev. A. G. Caruth and Helm & Bruce for appellant; James Harlan for appellee.

Limitation—See Pleading, 2—

Adverse possession—The actual possession of land for fifteen years under an unconditional parol gift will bar a recovery by the donor, and though donee entered expecting that at some time the donor would convey or devise the land to her. If, however, she entered by the mere permission of the donor, expecting him to give it to her, then she can not convert her possession into a hostile holding so as to defeat the recovery, nor will the law presume a gift from the entry and possession under such circumstances. Chamberlain, &c. v. McKinney. November 1, 1884. Russell Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Montgomery & Jones for appellants; Hays & Stone for appellee.

Married Women—

Title bond—The bond of a married woman for title was not only voidable but void, and the obligor having died before she executed a conveyance the land she agreed to convey descended to her next of kin. The chancellor, therefore, properly rescinded her contract, and the judgment in this case vacating the judgment of rescission is reversed. Cummings, &c. v. Hamilton, &c. November 15, 1884. Mercer Cir. Ct. Opin. by

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Pryor, J., Ct. Ap., rev. P. B. Thompson, Sr., for appellants; Bell & Wilson for appellees.

Master and Servant—

Where one does not hold himself out as skilled in a particular business and his employer knows that he is without experience, all the duty he owes his employer is to act with fidelity to the extent of his ability, whatever it is. Southern Wheel and Handle Co. v. Moorman. November 21, 1884. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Weir, Weir & Walker for appellant; Williams & Powers for appellee.

Mortgage—

1. Conveyance with agreement to reconvey—When land is conveyed absolutely and the grantee agreees to reconvey upon the grantor's paying a certain sum of money the transaction amounts to a mortgage only.

   K. having purchased C.'s land at decretal sale, C. procured R. to redeem the land for him, and thereupon K. transferred to R. the benefit of his purchase, and a deed was made to R. by the commissioner, R. executing to C. a writing whereby he agreed to convey the land to C. in the event C. should pay to him in twelve months the sum he had paid to redeem the land. C. having failed to pay the money and never having surrendered possession of the land, R. instituted this action for the recovery of the land.

   Held—That the transaction was simply a loan from R. to C., R. holding the land as security for the debt. Coffey v. Ranney. November 25, 1884. Wayne Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. J. S. Vanwinkle for appellant; M. C. Saufley for appellee.
2. Stock of goods—Where the mortgagor of a stock of goods is permitted to buy and sell as if there were no mortgage, in a controversy with other creditors it devolves upon the mortgagee to show what particular part of the mingled mass is embraced in his mortgage. Rosenberg & Nathan, &c. v. Thompson, &c. November 17, 1884. Appeal from Montgomery Cir. Ct. Opin. of the court by Bowden, J., Sup. Ct., rev. Reid & Stone, Arthur Carey, Laf Joseph and H. Marshall for appellants; W. H. Holt for appellees.

Municipal Corporations—See County Courts, 9.

Negligence—

1. Willful neglect—In this action by appellee against appellant for willful neglect in causing the death of appellee's intestate, who was killed while acting as brakeman on one of defendant's freight trains, facts that he was not of age and that his mother had notified the conductor not to employ him, and that he was subsequently employed at his own request after stating that his mother had withdrawn her objection, were not sufficient to authorize the jury to infer willful neglect.

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2. Infants—One who employs an infant old enough and large and strong enough to do the work he is employed to do, knowing at the time that the parent of the child objects to the employment, does not, by reason of that knowledge, become liable in punitive damages for any injury the infant may receive while employed, regardless of whether or not he is charged with want of care.
3. Pleading—In an action by a personal representative against a railroad company for willful neglect, under section 3 of chapter 57, General Statutes, no recovery can be had for ordinary negligence unless it is alleged that the plaintiff's intestate was not in the employment of the company. Ky. Cent. R. R. Co. v. Dunn's Adm'r. November 26, 1884. Nicholas Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. O'Hara & Bryan for appellant; Norvell & Tureman, W. P. Ross and Wm. Lindsay for appellee.
4. Leaving train in motion—While a passenger on a railroad train who voluntarily undertakes to leave the train before it stops is guilty of negligence, yet when told by the conductor to leave, and the passenger, unaware of the danger, relies upon the direction of the conductor, and an injury results to the passenger, who is guilty of nothing more than following the conductor's advice, the railroad company is responsible, and this rule is held to apply where a passenger, by the conductor's direction, attempted to leave a train while in motion at a crossing between stations, the conductor having agreed with the passenger when he entered the train to stop at the crossing. L. & N. R. R. Co. v. Sharp. November 22, 1884. Taylor Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Lyttleton Cooke, W. Lindsay, John McChord and W. S. Knott for appellant; Russell & Avritt for appellee.

New Trials—

1. When a motion for a new trial has been made and overruled the court can not, after the expiration of the time within which it has power over its judgments, set aside the order overruling the motion and grant a new trial.
2. A motion for a new trial in the Louisville Chancery Court, except upon the ground of newly-discovered evidence, must be made within fifteen days after the judgment. Bland, &c. v. John, &c. November 12, 1884. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., dis. Harrison & McGrain for appellants; Elliott & Hemingray for appellees.

Partnership—

1. Debts—Where one of two partners borrowed money before the actual terms of the partnership had been agreed upon, but borrowed it in contemplation of the partnership and used it in purchasing partnership property and the firm treated the debt as a partnership debt, it should be so treated in the distribution of the partnership assets.
2. Dissolution—A member of a firm can not relieve himself from liability for money paid to his partner for the firm by showing that he had notified the persons paying the money not to trust his partner. He should have protected himself by dissolving the partnership. Brooks, Water-

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field & Co. v. Lovelace & Co. November 25, 1884. Kenton Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Hallam & Myers for appellants; Collins & Fenley for appellees.

Pleading—

1. Bill to discover defendant—The Civil Code, section 655, prohibits a bill to discover a sole defendant.
2. Amendment—Limitation—Where a petition was filed against several defendants, declaring that the plaintiff did not know who owed him, and, therefore, could not state a cause of action against anyone, but asking for information to enable him to do so, and an amended petition was filed stating a cause of action against one of the defendants, limitation continued to run until the filing of the amendment, the original proceeding being expressly prohibited by law. Mowery v. Webb. November 19, 1884. Henry Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Ward, P. J., dissenting. Geo. C. Drane for appellant; Carroll & Barbour and R. W. Masterson for appellee.

Pleading and Practice in Criminal Cases—

1. Impeachment of witness—The statements of a witness on a former trial having been admitted in evidence, the witness being dead, his testimony can not be impeached by proof of contradictory statements made subsequent to the former trial.
2. Conitnuance—The refusal of the lower court to grant a continuance upon the ground of the absence of a witness was not prejudicial, as the testimony of the absent witness could have produced no appreciable effect upon the final result.
3. Corroboration of accomplice—The court having properly determined that there was evidence to corroborate the testimony of the accomplice, it was for the jury to determine its weight and credibility. Neal v. Commonwealth. November 13, 1884. Carter Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Brown & Lackey, Z. F. Smith, Jr., and Wood & Day for appellant; P. W. Hardin and K. F. Pritchard for appellee.
4. Jurisdiction—An indictment having been found in one court for an offense of which another court has exclusive jurisdiction, a formal order setting aside that indictment was not necessary before proceeding under an indictment found in the court having jurisdiction, to which a copy of the first indictment and the original papers had been transmitted.
5. Impeaching witness—It was incompetent for the Commonwealth to impeach the testimony of defendant's witnesses by proving statements made by them at the inquest, without first having laid the foundation for the attack by giving them an opportunity to explain. Roe v. Commonwealth. November 22, 1884. Madison Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Chenault & Parrish for appellant; P. W. Hardin for appellee.

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Practice in Civil Cases—

1. Prejudicial error—The overruling of exceptions to appellee's testimony when his cause was made out by other evidence in the case did not prejudice the appellant's rights. Burks, &c. v. Strader. November 25, 1884. Barren Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Leslie & Botts and E. W. Hines for appellants; Porter & Ritter, W. P. D. Bush and Finlay F. Bush for appellee.
2. A reversal may be had for error in an instruction, although all the evidence is not before the court, if the instruction be such that it could not have been correct, whatever the evidence. L. & N. R. R. Co. v. Cambron. November 12, 1884 Marion Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. Lindsay and Rountree & Lisle for appellant; J. P. Thomp son for appellee.
3. The finding by the court or jury of a fact, the existence of which is denied by the petition, can not profit the plaintiff. Mowery v. Webb. November 19, 1884. Henry Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff., Ward, P. J., dissenting. Geo. C. Drane for appellant; Carroll & Barbour and R. W Masterson for appellee.
4. New trial—An alleged error occurring during the progress of a jury trial must be definitely mentioned as a ground for a new trial in the lower court, or it can not be relied on for a reversal in an appellate court.
5. Reversing judgment—Upon all appeals granted prior to the amendatory act of 1884 the Superior Court has no power to reverse a judgment except for the particular errors assigned.
6. The appellant, being in no position to question the correctness of the verdict, can not complain of a judgment that strictly pursues that verdict. Commercial Publishing Co. v. Caldwell, &c. November 24, 1884. Jeff. Ct. of Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. A. E. Wilson for appellant; J. T. O'Neal and Thomas Joyes for appellees.
7. Where an ordinary action is tried by the court and the conclusions of fact are found separately from the conclusions of law and separately from each other, they should have the same effect as the separate verdict of a jury, and upon appeal judgment should be ordered in conformity thereto, applying the law as understood by the appellate court and not as found by the trial court. Southern Wheel and Handle Co. v. Moorman. November 21, 1884. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Weir, Weir & Walker for appellant; Williams & Powers for appellee.
8. Affidavit to petition—Where the averments in a petition are positive the plaintiff, in swearing to the petition, may qualify his affidavit by stating that "he believes" the statements of the petition are true, although such a qualification is objectionable where the averment in the petition is that the plaintiff has information or belief simply. Gillham v. Baldwin & Co. November 19, 1884. Campbell Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. J. F. & C. H. Fisk for appellant; J. S. Ducker for appellees.
9. Partial transcript—A judgment can not be reversed upon a partial or imperfect transcript unless there is enough of the record before the

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court to authorize it to say that the appellee did not in the pleadings show himself entitled to the relief afforded. Cord v. Hendrick. Tabler v. Cord. November 26, 1884. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. W. H. Cord for Cord; W. J. Hendrick for Hendrick and Tabler.

Railroads—See Negligence, 1, 4—

Killing stock—In an action against a railroad company for negligently killing stock the company can not be held responsible unless the injury could have been avoided by its agents, with due regard to the safety of the train and its contents. L. & N. R. R. Co. v. Cambron. November 12, 1884. Marion Cir. Ct. Opinion by Bowden, J., Sup. Ct., rev. W. Lindsay and Rountree & Lisle for appellant; J. P. Thompson for appellee.

Rent—See Attachment, 1, 2; Claimant's Bond; Executions.

Self-Defense—

1. Reasonable grounds—In exercising the right of self-defense a party has the right to act upon appearances, "as they seem to him," but he must act reasonably and upon reasonable grounds. Palmer v. Commonwealth. November 18, 1884. Owen Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Warren Montfort for appellant; P. W. Hardin for appellee.
2. The law applies the same rule as to what is self-defense, no matter what may be the peculiar temperament, whether nervous or otherwise, of the defendant. Morris v. Commonwealth. November 20, 1884. Campbell Cir. Ct. Opin. by Lewis, J., Ct. Ap. Hallam & Myers and Carlisle, Goeble & Carlisle for appellant; P. W. Hardin for appellee.

Surety—See Bankruptcy; Bonds.

Taxation—

In aid of turnpike—In this action to enjoin the collection of a tax levied in aid of a turnpike company, under an act authorizing a tax to be levied and collected until the road should be finished and "paid for," the road having been completed, it is held that the taxpayers are liable for only the difference between the cost of the road and the amount heretofore collected by the company, the company having failed to disclose what has become of the money collected. The corporation has no right to squander the funds raised by taxation and then insist that the taxpayer must answer for its wrong. Concord v. Tollesboro Turnpike Co. November 22, 1884. Lewis Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. W. H. Wadsworth for appellant; W. Lindsay and Geo. T. Halbert for appellee.

Usury—

It is the duty of a personal representative to plead usury where it exists, and where it appears from the record that there is usury no more than the legal rate should be allowed against the estate of the decedent, although usury be not pleaded. Elder's Ex'or v. Weber. November 10, 1884. Crittenden Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. W. Blue for appellant; James R. Hewlett and W. H. Posey for appellee.

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NEW BOOKS.

Myers' Federal Decisions. Reports of U. S. Supreme, Circuit and District Courts, comprising opinions of those courts from their organization, and extracts from opinions of Court of Claims and of the Attorneys General. Vol. V. California. Conspiracy. Gilbert Book Co., St. Louis, Mo.

We have already noticed the merits of this series of reports. It is a reprint, at a greatly reduced price, of that vast mass of able and learned opinions contained in the Federal reports, many of which have become so rare that they are not accessible even in many public law libraries in the South and West. These volumes bring those opinions within reach of all. This volume sustains the general plan of the work.

Law of Mortgages of Real and Personal Property, including also the law of Pawn or Pledge and Collateral Securities, referring to both American and English decisions. By Chas. O. Boone. Sumner, Whitney & Co., San Francisco, Cal.

This is a practitioner's work. It is a digest in which the law as actually laid down in the cases is summed up—not a treatise setting forth the theories of the writer. This is the only form of law book now practicable—the bulk of the law remaining as huge as it is. A book which contains all the cases on this important subject of mortgages, properly arranged for instant reference, is obviously a valuable aid to any and every lawyer. Its size is a recommendation; it is not the usual ponderous quarto, but a small 12 mo., convenient for the pocket and for easy handling.

Spears on Extradition. Weed, Parsons & Co., Albany, N. Y.

Charging the Jury. By Seymour D. Thompson.

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Liability of Directors and other Officers and Agents of Corporations. By Seymour D. Thompson.

Common Carriers. By John D. Lawson. All published by W. H. Stevenson, St. Louis, Mo.

Rover on Railroads. Callaghan & Co., Chicago, Ills.

Tiedman on Real Property. F. H. Thomas & Co., St. Louis, Mo.

Foreign Judgments and the Practice as to Parties out of the Jurisdiction. William Clowes & Sons, London.

Two lawyers while bathing, being chased out of the water by a shark, one of them said to the other: "It strikes me that that was a flagrant want of professional courtesy."

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The Kentucky Law Reporter

EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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NOTES.

The Mignonette case, which has been recently occupying the attention of the English courts, presents a very interesting question (and one which it is said never arose there before), as to whether necessity can ever justify one in taking the life of another, peaceable, unoffending person, to preserve one's own life.

The Mignonette being wrecked at sea, the crew, who escaped in the life boat, were driven to such terrible straits for food that they finally killed one of their number and ate him. They were afterwards picked up brought into port, where they were indicted for for murder, and set up as a defense the absolute necessity of killing one of their number in order to preserve the others from starvation. But Lord Coleridge, who presided, held that necessity could not justify such an act. It would be dangerous to allow that so uncertain a thing as necessity could excuse the taking of life, that in general to preserve one's life is a duty, but there may be cases even where it is the plainest duty to sacrifice it; this was a precept of heathen ethics. He had in mind perhaps the lines of Juvenal.

> **Summum crede nefas vitam præferre pudori,**
> **Et propter vitam vivendi perdere causas.**

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He closed his opinion admirably, in a strain of subdued eloquence, as follows: "There is no safe path for judges to tread but to ascertain the law to the best of their ability, and declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it. It must not be supposed that in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we can not reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is, therefore, our duty to declare that the prisoner's act in this case was willful murder; that the facts as stated in the verdict are no legal justification of the homicide."

So far as morality (as distinguished from law) is concerned in this question the answer is very plain. It is confessedly wrong to take human life, but must twelve men perish when by the sacrifice of one the other eleven might live? Undoubtedly yes. A wrongful act is not justified by the good result intended to be secured. We have nothing to do with consequences. But there is the authority of Lord Bacon for saying that where two are shipwrecked and both get on the same plank, which can not hold both, one may thrust the other off to save himself from drowning. But Lord Hale doubts this, and argues that a man can never excuse the killing of another, who is innocent, under threats, however urgent, of losing his own life if he does not comply. This question was decided in this country in the Holmes case in 1 Wall., Jr., 1, where the crew and passengers, having taken to the life boat, found that it could not hold out against the waves with all of them in it; the crew accordingly threw the passengers overboard. One of

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the crew was afterwards indicted in the U. S. Cir. Ct. (Penn.), for the crime, and the judge (Baldwin) appears to have admitted that necessity excuses such an act, though he sentenced the prisoner because the passengers were not allowed a fair chance. Maritime skill could not be useful in a boat like theirs cast off on the waves, a sailor was then of no more value than a passenger, and it being the sailor's stipulated duty to preserve the passenger at all hazards, if one or the other must be sacrificed the sailor must go. On the contrary, if the crew were necessary to the management of the ship, the first reduction ought to take place from the ranks of the passengers. Then, too, those to be sacrificed should have been determined by lot, which was not done.

Sir James Stephens, in commenting on this case, thinks it ought not to be followed in an English court. Though he lays down a proposition in one of this works which was forcibly cited by defendant's counsel in the Mignonette case, with the effect of drawing from the author a disclaimer of meaning to give any countenance to the plea of necessity as a justification.

It has been asked if, in the following state of case, one engaged in committing a felony was not justified in committing a murder. The man entered a house to commit a burglary, but was heard by the owner and attacked in the darkness, and struck down from a blow on the head. He managed to crawl out of the house and conceal himself in an outer shed, where the owner of the house next morning found him bleeding and helpless, and again attacked him; had the man killed his assailant would it have been murder?

An Irishman named O'Brien was convicted of high treason and sentenced to death, but the English government, on account of the absurd and even ludicrous nature of his plot, was induced to pardon him on condition that he would leave the

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country forever. He, however, took very high ground and insisted that they had no right to grant a conditional pardon; they must either let him go free absolutely or hang, behead and quarter him, in pursuance of the sentence.

His obstinacy caused considerable trouble at first, as it was discovered on investigation that he was right in point of law. A special act, however, was put through Parliament (against which he petitioned), authorizing the conditional pardon. He was obliged to leave the country, but was afterwards granted a free pardon.

Can a railroad make special rates in favor of one shipper—lower than the rates made for the public generally? Plaintiff, in a recent case in Ohio, sued the railroad for $5,000, the amount paid by him in excess of that paid by the Standard Oil Co. for transporting the same number of carloads of the same goods. The railroad insisted that it could reasonably make a difference in favor of a large shipper as against a small one, and might agree to take 1,000 carloads at a lower rate than 100. But the court held that while this might be true, yet the rate given one shipper of 1,000 cars must be given to all who shipped that number—to plaintiff as well as to the oil company. Railroads exercise the right of eminent domain. The condition on which they are allowed to exercise it—to seize private property for their own purposes—is that the line shall be operated for the public good. But if they discriminate in favor of one shipper as against another, private property is to that extent taken, not for the public good, but for the benefit of a favored few.

KENTUCKY COURT OF APPEALS.

HASELWOOD'S EX'OR, &c. v. WEBSTER, TRUSTEE, &c.

(Filed November 29, 1884.)

Will—Revocation of devise—Testator devised a tract of land to certain of his heirs and afterwards sold part of the land, Held—Devisees were entitled to so much of the land as remained unsold, and to the notes taken for the

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portion sold. Where land which has been devised to an heir is afterwards sold the sale does not revoke the devise unless testator's intention to revoke is affirmatively shown.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Holt.

The seventh clause of the will of Alfred Haselwood reads as follows, to wit:

"I will and bequeath to John E. Webster, Thomas William Webster and Sarah Elizabeth Webster, children of Richard A. and Ermine H. Webster, the tract of land on which Samuel E. Williams lived and died, less fifty acres willed to Alfred Cliff Webster, to have and to hold forever, and appoint Richard A. Webster trustee or agent for the children, and no security to be taken."

On November 5, 1878, and after the making of the will, the testator sold the greater portion of the land so devised for $1,806, for which he took five notes, payable to himself, and retained a lien for their payment in the deed made by him to the purchaser, W. H. Haselwood.

The testator died in 1880; and on January 8, 1881, this action was brought by the above-named children of Richard A. and Ermine H. Webster and their trustee against the executor of their said uncle, Alfred Hazelwood, the devisees of the residuary portion of his estate and the purchaser of the land, to recover said notes and a small sum of money that had been paid upon one of them to the executor.

In the event this relief was not afforded, then a judgment was asked against the executor for a sum equal to that for which the land had been sold.

Pending the litigation by consent the sale of the land was rescinded, and it, so far as this suit was concerned, was to stand in lieu of the purchase money, the successful party to have the land, instead of the notes and money, as the cause was to be tried as if there had been no rescission.

The plaintiffs succeeded below, and the executor, Wm. C. Webster, and his wife and children, who were the devisees of

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the residuum of the estate and get nearly all of it, are now complaining.

It was a rule of the common law that a sale by the testator, subsequent to the making of his will, of land devised by it or of a chattel bequeathed by it was a revocation of the devise, or an ademption of the legacy.

His intention in so doing could not be considered.

This rule yet prevails in this State unless the devisee or legatee is an heir of the testator.

Chapter 50, article 3, section 1 of the General Statutes, reads thus: "The conversion, in whole or in part, of money or property, or the proceeds of property devised to one of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisee shall have and receive the value of such devise unless a contrary intention on the part of the testator appear from the will or by parol or other evidence."

The statute casts the burden upon one claiming against a will of showing that the testator, by selling the property, intended a revocation. In this case, therefore, it was not incumbent upon the plaintiffs to allege in their petition that he did not so intend; and the demurrer to the petition upon this ground was properly overruled. It was necessary for the defendants to, and they did, allege affirmatively that it was so intended. (Hocker, &c. v. Gentry, &c., 3 Met., 463.)

The 12th section of chapter 113 of the General Statutes provides that "no conveyance or other act subsequent to the execution of a will shall, unless it be an act by which the will is revoked as aforesaid, prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death."

It is urged by the counsel for the appellees that, by virtue of the above provision, even if Alfred Haselwood intended by the sale of the land to revoke the devise of it, yet the pur-

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chase money notes therefor would pass to the appellees under the will.

The conclusion we have reached in this case renders it unnecessary to discuss this question; but the zeal with which it is urged is worthy of some notice. The section of the statute last named simply provides that no act, except a revocation in accordance with the statute, shall prevent a will from operating upon the estate named therein to the extent that the testator may own it at the time of his death. If he has disposed of a part of it, then the remainder must pass under his will owing to his being the owner of it at the time of his death.

The section of the statute first above cited applies to a case where the property named in a will is afterward converted into other property; while the words "such interest in the estate" in the section last named are equivalent to the words "such portion of the property." The latter expressly declares that which is but an implication from the former, and there is no conflict between the two sections.

As the appellees were heirs of the testator the only real question in this case is one of fact: Did he, by a sale of the land, intend to revoke the devise?

It is proper to presume that the judgment of the lower court upon this question is correct; but upon a careful examination of the record we are satisfied of it.

The testator wrote his own will; and if he, after making it, concluded not to give the appellees any portion of his estate it is reasonable to suppose he would have added a codicil to it to that effect.

There is no testimony tending to show that he ever expressed any desire to change it, or to violate his promise made to Ermine H. Webster upon her deathbed, to the effect that her children should have all that he might ever realize on the indebtedness of her husband that was secured by mortgage to him, and which sum so realized was $2,300.

It is urged, however, that the testator became unfriendly with the father of the appellees, and, therefore, withdrew his

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bounty from the children; but the testimony upon this point is conflicting, and if true it is singular that he never revoked so much of the tenth clause of his will as released Richard A. Wesbter from the payment of all that he was then owing him.

Some of the testimony tends to show that the testator said that he had offered the Williams land to Richard A. Webster for his children, and that he had declined it; and that he had nothing more to offer him or "could do nothing more for them;" but even admitting this to be true, yet these expressions did not necessarily mean that they were not to have what he had offered their father, or the proceeds arising from its sale.

The testimony does not disclose that he ever intimated that he had sold the land in order to revoke the devise of it. In fact he did not sell all of it; and this circumstance tends to show that the revocation of the devise to the appellees was not his object in making the sale.

He found a purchaser for a certain portion of it at a good price. Richard A. Wesbter says that the testator told him that he intended it for the appellees, but that he had been offered a certain price for it, and the father of the appellees then advised its sale upon the ground that the money would be worth more to them than the land.

One witness says that the testator told him, as late as 1879, that he intended to do something for his niece, Ermine's, children; while upon the other side it is in testimony that he said that he intended W. C. Webster or his children to have all his property.

But the trouble as to the latter statement is that the witness testifies that he heard him so say often, and before the year 1877 or before the will was made; and it shows a contrary intention.

We have thus, to some extent, reviewed the testimony in order to show that it is at least conflicting; and it is unnecessary to review the rulings of the court upon the exceptions to the depositions because, whether sustained or reversed, they are not sufficiently important to change the result.

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The burden rested upon the appellants to show that the testator intended by the sale to give nearly all of his property to them, and to revoke a devise to others more nearly related to him than the appellants.

The mere sale did not create a presumption that this was his object. In such a case the intention must be shown by other testimony than that of the conversion merely, and the judgment is affirmed.

W. E. & S. A. Russell and W. Lindsay for appellants.

R. S. Montague and W. B. Harrison for appellees.

WOOLLEY v. PRESTON AND EWING.

(Filed December 9, 1884.)

1. Wills—Trustees—Termination of powers—Testatrix devised her estate to trustees to pay her debts, and for that purpose gave them full power to sell, mortgage or reinvest, and to divide the residue, after payment of debts, between her children. Held—After the debts had been paid the trustees' powers expired, and they became mere dry trustees of the naked legal title only, which the children might, at any time, compel them to convey by absolute deed, without reserving to themselves any further power to sell, mortgage or reinvest.

2. Trusts—Restriction on alienation—Liability for debts—The will further provided that the trustees should hold one-half of the share of each son in trust for the son during his life, without any power in the son to alienate or charge it for debt. Held—The restriction on alienation being repugnant to the grant of a life estate, contrary to the statute and void, each son is entitled to have his entire share conveyed to himself free of trust.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hines.

The question presented is the construction of the will of Mrs. S. H. Woolley. She died in 1873, possessed of a large quantity of real estate in Kentucky and in the State of Arkansas, having personal estate of comparatively little value, and being indebted from $45,000 to $50,000. The will appointed William Preston and others executors, and subsequently appellee, A. J. Ewing, was associated with William Preston in the discharge of the executorial and trustee duties imposed by the will.

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The pertinent clauses of the will are:

"2d. I request my executors to collect the assets of my estate, and pay all just debts which may be legally established and proven, or which they in their judgment may believe to be just, according to their discretion."

"4th. It is my will if my personal assets should be insufficient to pay my debts, or to carry into effect the provisions of this will, then my executors and trustees shall have full and ample power to sell and convey, transfer or assign, mortgage, charge or encumber such part or portion of my estate, real or personal, as they may deem proper, in order to carry out the provisions of this will."

"6th. It is my will that my executors and trustees shall, after the payment of my debts and settlement of my estate, divide, or cause to be divided, all the rest and residue of my estate, real, personal or mixed, into equal portions, for the purpose of making just and equal partition among my children and their descendants; and after such division shall have been made, I direct my executors and trustees to convey to each one of my children, or their descendants entitled thereto, one-half of such share or portion, absolutely and in fee simple, and the other half of such share shall be held or invested in good real estate, in the discretion of my executors and trustees, for the use and benefit of my said child for the term of his natural life, and after his death for the use and for the benefit of his children; or, in default of children living at the time of his death, to such uses as such child may declare, limit or appoint, by deed or will; and in default of such appointment, then such moiety of such share shall pass to and vest in the heirs of such child absolutely in fee. And my trustees may permit such child to retain possession of the moiety of such share without any account of rents or profits, or to hold, use and occupy the same for life without any account, and without impeachment of waste and without any responsibility of said trustees therefor. It is my will that this provision shall only apply to the shares of my sons, and not to the shares of my daughters, which are hereinafter specially provided for by me."

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"7th. For the purpose of effecting the partition directed in the foregoing trust, and of carrying into effect the provisions of this will, my executors and trustees may make division of my property, or sell, convey and convert the same into personal property or money, in their discretion, and may reinvest the moieties of the shares of my children in other real estate, in Kentucky or elsewhere, in their discretion, to be held according to the provisions of the foregoing trust, viz., with the rents, issues, profits or income thereof, for the use of such of my children as may be entitled to the moiety of such shares for life, with remainder as provided in the foregoing trust."

"14th. And it is my will that my executors and trustees shall have full power and authority from time to time, in their discretion, to sell and convey, assign or transfer the respective moieties of my sons, mentioned and provided for in the sixth item of this will; and to reinvest, as they may choose, the proceeds of any such sale in any other real estate, whether productive or unproductive, in Kentucky or elsewhere; and my said sons shall have no power to sell and convey, mortgage, charge or encumber their respective moieties in any manner so as to impede, abridge, impair, or destroy the right of my executors under this will, or their successors, to sell and convey said moieties and reinvest the proceeds in any other real estate, in Kentucky or elsewhere, to be held upon the same trusts and conditions; and to that end it is my will that the legal estate in said moieties shall be vested and remain in my said trustees, with a right of entry upon the lands so to be held as against my sons and all other persons whomsoever."

Shortly after the death of the testatrix, and on the suggestion of the trustees, the property designated in the will as the "Howard's Grove" estate and a house and lot in Lexington, Ky., were divided by agreement between the devisees and the executors or trustees, into equal parts, each devisee taking one part, with the understanding and argeement that each of the devisees should advance the sum of $3,500 to create a fund by which to pay the debts then pressing the estate, and that the

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sum so to be advanced would be sufficient to release, and should release, the respective shares of all liability to the creditors of the estate. Under this agreement the devisees entered into possession of the portions assigned to each, and, with the exception of appellant, deeds were executed reserving a lien on the part conveyed to secure the payment of the stipulated sum of $3,500, and, as to appellant, he paid his portion in cash.

To appellant a deed was tendered by the trustees reserving the right in the trustees to sell and reconvey the property for reinvestment, at the discretion of the trustees. This deed appellant refused to accept, and this action was brought to compel the trustees to convey to him, in fee simple, one-half of the land set aside to him under this agreement, and the other half for life and at his death for the use and benefit of his children; or, in default of children living at his death, to such use as he might declare by deed or will, as provided in the sixth clause of the will. The case exhibited shows that all debts against the estate are either satisfied or that there is in the hands of the trustees ample means to satisfy them.

The question then is whether the will contemplated that the trustee, under such circumstances, should retain any control over the estate, and, if it was so contemplated, whether such restriction is not in violation of the provisions of the statute?

The second, the fourth, the sixth and the seventh clauses of the will quoted, considered without reference to the fourteenth clause, which will be hereafter referred to, clearly establish an intention on the part of the testatrix to create, first, a trust to preserve the estate for the payment of debts; and, second, that, after the payment of debts, the estate should be equally divided between the devisees, one-half to be held by each in fee simple and the other half for life, with remainder to the children of the devisee; and in default of children, to be at the disposal of the devisee by will or deed. The testatrix must be presumed to have known the embarrassed condition of her large estate and to have realized the necessity for judicious management of

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the estate in order to preserve of it as much as possible for division, as she indicated, among her children. To accomplish this object the testatrix conferred upon the executors plenary powers of sale, reinvestment, to mortgage the estate as in their judgment and discretion they might see proper. When this duty of managing the estate for the purpose of paying the debts, which appears to have been done, was performed the trust ceased and it became the duty of the trustees to convey the naked legal title, which alone remained in them, to the devisees, as provided and limited in the sixth clause of the will. Where, as in this case, there is no duty to be performed by the trustee and no liability resting on him to look to the manner in which the cestui que trust shall use the trust property, the trustee is a simple or dry trustee of the legal title, which a court of equity may compel him to convey to the beneficial owner of the use. (Perry on Trust, sections 520, 521; Thomas v. Harkness, 13 Bush, 23.)

The right of appellant to a conveyance from the trustees to the property in controversy is unquestioned unless the fourteenth clause of the will, already quoted, forbids it. That clause, when stripped of its verbiage, seems to have two purposes, first, to prevent voluntary alienation by the life tenant; and, second, to prevent the life estate from being subjected to the debts of the life tenant.

It is unquestioned that the intention of a testator, when legal, gathered from the whole will, governs the distribution of the estate, and that within the limits prescribed by common law and the statutes the testator has a right to dispose of his property as he chooses. Beyond those limits there is no power, notwithstanding the intention is clear, to fetter the estate. In general, when a devise of an estate is absolute and unqualified, whether it be in fee or for life, and is followed by an indefinite provision against alienation, the latter condition is void for repugnancy, and the estate vests in the devisee as if no such qualification or condition had been attached.

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Restraint upon alienation, when it is limited in favor of particular persons, when the estate is to terminate upon a certain contingency, when it is to protect the reversion or the interest of a third party, will be sustained and enforced, for in such cases the limitation is in the nature of a trust for those who may be interested with the devisee of the particular estate. In this case the devise of the estate for life was absolute. The devisee was expressly given the right to occupy, to use, enjoy, and receive the profits of the estate during his life, without responsibility in any way or to anyone for the manner in which he might use the estate and without "impeachment for waste." Under no circumstances and in no contingency was anyone, except the life tenant, to have any interest in the life estate so devised. The unqualified restriction upon alienation under such devise was void because repugnant to the estate granted. (Redfield on the Law of Wills, volume 2, pages 287-8; Mandlebaum v. McDowell, 29 Mich., 78; 2 Jarman on Wills, 38; Blackstone v. Davis, 21 Pickering, 43; Lovett v. Gillender, 35 N. Y., 620.)

The restraint upon alienation attempted in the fourteenth clause of the will appears to have been in furtherance of the design, therein manifested, to prevent the life estate of the devisee from being subjected to the payment of the debts of the life tenant. If so intended it was void because in violation of the express provision of the statute, independent of the question as to repugnancy.

Section 21, article 1, chapter 63, General Statutes, reads: "Estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed, as they own, or shall own, in the use or trust thereof."

As we have suggested there is no third person, remainderman, reversioner, or contingent beneficiary of the particular estate that can in any way be affected by the manner in which

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the life tenant may use the estate devised. He is sui juris, and as such has an unquestioned right, when he alone is affected, to waive any exemption of his estate from liability for his debts. The trustees have no possible interest. Why then allow them to retain the naked legal title which could operate only to defeat the beneficial use of the estate expressly given to the devisee?

The statute quoted provides that where one "owns" an interest "in the use or trust" of the property it may be subjected to the payment of his debts in the same way as if he owned the property itself. In this case there is an unqualified ownership by the devisee in the use of the property.

The only cases in which this court has refused to subject property held in trust to the payment of the debts of the cestui que trust have been cases in which a discretionary power was given to the trustee to withhold all payment or beneficial use to the cestui que trust. In such cases there was no ownership by the cestui que trust in "the use or trust" of the property, but the "ownership" was in the trustee, with the right to give or withhold at his pleasure. There was no claim of the cestui que trust which he could enforce against the trustee, and, therefore, no claim which the creditor, by substitution, could enforce against the trustee. (Davidson's Ex'ors v. Kemper, 79 Ky., 11.)

The prayer of appellant for a deed under the limitations in the sixth clause of the will should have been granted, and the judgment is reversed and cause remanded, with directions to cause the trustees to execute to appellant such a conveyance.

B. F. Buckner for appellant.

WHITLOCK v. LEDFORD, &c.

(Filed November 29, 1884.)

1. Counterclaim—Trespass—Ejectment—Plaintiff sued to recover damages for trespass to land. Held—Defendant may bring in as a counterclaim his sworn title and have judgment for the land.

2. Arbitration—Waiver—Notice—A question having been submitted to arbitration, Held—One of the parties might waive his right to be present at

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the arbitration, and the award found in his absence will be valid. No copy of the award need be served on him. A promise of the arbitrators to reopen the award after it had been once found is not valid.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Hines.

This is an action for trespass to land, the plaintiff averring title in himself. The defendant denied title in the plaintiff; averred an arbitration and award by which it was determined that the title to the land in dispute was in the defendant, and alleged title in himself, and sought by way of counterclaim to recover of the plaintiff the whole tract of land in controversy.

The court adjudged the title to be in the defendant, and that he recover of the plaintiff the land.

It is objected by appellant that such a counterclaim can not be set up in such an action.

Section 96 of the Code says: "A counterclaim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract, or transaction, stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action."

The subject of the action is the land in controversy and the foundation of plaintiff's claim is the asserted legal title to the land. The fact that the plaintiff seeks to recover damages for trespass does not alter the character of the action from a direct proceeding to recover the land on the allegation of title, and in such a case there could be no doubt of the defendant's right to assert title in himself and have it so adjudged. The counterclaim asserted is clearly connected with the subject of the action.

Appellant further complains that the award of the arbitrators ought not to be held binding on him because the final hearing was in his absence, without his knowledge, without his consent, and that he never received from the arbitrators a copy of the award.

The evidence in regard to the arbitration is that it had been pending seven or eight months, there had been a partial

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hearing. a continuance because the arbitrators rejected the ex parte affidavit of certain witnesses by whom appellant offered to prove that appellee had stated that his purchase did not cover the land in controversy. The postponements were from time to time in order to enable appellant to produce these witnesses before the arbitrators. On the evening preceding the final action of the arbitrators appellee testifies that he saw appellant and told him that he was going to town the next day to complete the arbitration, and that appellant responded, go ahead, and tell the arbitrators I will not be there. Two other witnesses who were present testify in substance the same.

Appellant, however, says that he told appellee to go on with his evidence before the arbitrators, and, as he could not go, to tell the arbitrators that he would introduce his evidence at some future day. Appellee notified the arbitrators that appellant would not be present, and that he authorized him to say that they might proceed to finding without his presence. Upon this statement the arbitrators considered the title papers before them and the evidence previously heard, and adjudged that the title to the land was in appellee, and rendered an award in writing which was delivered to appellee. Subsequently to the award, of which appellant in some way obtained information, appellant applied to the arbitrators to reconsider the case as he had not intended or consented that they should proceed without hearing further evidence in his behalf, and the evidence shows that they promised to reconsider the matter and hear the evidence for appellant at any time, which was never done.

The arbitration was at common law, untrammeled by the provisions of the Code in reference to submission to arbitration under order of a court, and its sufficiency is to be determined by the rules applicable to common law arbitrations. Under such an arbitration a party might waive notice of the meeting of the arbitrators, or, having notice of the meeting, might decline to be present, and yet the award would be binding. In this case the law and facts were submitted to the court without

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a jury, and the judgment must, therefore, be treated as the finding of a properly instructed jury. In such a case, in ordinary as this is, we could not reverse unless the evidence was flagrantly in conflict with the verdict of the jury or the judgment of the court. As to notice of the action of the arbitrators and waiver of the right of appellant to be present at the arbitration the evidence, as substantially stated, preponderates in favor of the conclusion that appellant having notice waived his right to be personally present at the final action by the arbitrators. This appellant had the right to do in such a way as to bind him by the award, and that he did do so is testified to by three witnesses in opposition to his own statement to the countrary. The court having the right to weigh the evidence as a jury would have had, we are not authorized to disturb the judgment upon this ground.

In the absence of a stipulation in the written agreement of submission to arbitration a formal notice to appellant of the award, which was in writing and delivered to appellee, was not necessary to render it binding upon appellant. Nor can the promise of the arbitrators, made subsequent to the award, to re-open the arbitration and hear other evidence for appellant, affect the award, as the power of the arbitrators to act in the matter ceased on the return of their award. After that they had no more authority to act than if they had never been selected to act in the first instance. (Morse on Arbitration and Award, pages 121 and 290; Lansdale v. Kendal, 4 Dana, 613.)

The judgment being sustained upon this issue, it is unnecessary to consider the question as to whether there was fraud on the part of appellee in obtaining the transfer from Lindsay and in taking a conveyance for more land than he in fact purchased, as all these questions were merged in and settled by the award.

Judgment affirmed.

John W. McPherson for appellant.

Thos. C. Dabney for appellee.

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FRANKFORT, LEXINGTON & VERSAILLES TURNPIKE ROAD CO. v. COMMONWEALTH.

(Filed November 22, 1884.)

Taxation—Turnpikes—Constitutional law—A county has the constitutional right to tax so much of a turnpike as passes through the county.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Holt.

The portion of the appellant's turnpike road located in Franklin county having been assessed for an ad valorem tax for county purposes for the years from 1876 to 1883 inclusive, at a valuation of $5,000, the company asked the Franklin County Court to correct it, first, because it was illegal and unauthorized; and, secondly, because, if authorized, the valuation was too high. The motion being heard was overruled; and the appellant appealed to the Franklin Circuit Court; and the law and facts having been submitted to the circuit judge, he decided that the act of the legislature of March 17, 1876 (General Statutes, page 881), authorizing the taxation of turnpike roads for county purposes, was constitutional; that so much of the appellant's road as was situated in Franklin county, and the franchises thereof and any property connected with it, belonging to the company, were liable to assessment and taxation for county purposes; sustained the valuation that had been fixed, and in all respects affirmed the judgment of the county court.

The testimony does not, in our opinion, authorize this court to interfere with the valuation, sanctioned as it is already by the judgment of two courts.

In the cases of Applegate, &c. v. Ernst, 3 Bush, 648, and Graham, &c. v. Mt. Sterling Coal Road Co., 14 Bush, 425, and perhaps some other cases, it has been said that a railroad is an entirety, and is not a fit subject for local taxation by the counties through which it passes. In some of the cases these statements were dicta; while in others the opinions were rendered before the enactment of the law in question.

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In the case of the Lincoln County Court v. L. & N. R. R. Co., 3 Ky. Law Rep., 436, however, its constitutionality came directly in question, and was, as we think, properly upheld.

The protection of property by the government creates the obligation of the property owner to pay the tax; and this applies to the county as well as the State. The more money the county judiciously expends the greater benefit he receives; and this is equally as true of artificial as of natural persons. The revenue laws should apply equally to both, and we perceive no reason why the property of a turnpike company, like that of the individual, should not aid in the support of both the county and State governments.

It is urged, however, that a proper construction of the act in question does not authorize the taxation of the appellant's road; and that even if legally taxable, it is only so in the county where its officers reside.

The act directs that when an ad valorem tax is ordered by a county court it shall be assessed upon "all the property" in the county not specifically exempted, and expressly provides for the assessment of "all the property" of turnpike roads.

It can not be supposed that the legislature did not intend by the term "property" to include the interest of a company in a turnpike road, and only referred to what little property it usually owns aside from it. By section 17, chapter 21 of the General Statutes, it is provided that "all words and phrases shall be construed and understood according to the common and approved usage of language."

The term "property" in its broad sense includes even a franchise; and considering the amount of capital invested in railroads, turnpikes and other works to which this act by its terms expressly applies, and the fact that its title is "An act to make taxation equal and uniform in counties where an ad valorem tax is levied by the county court," there can be no doubt that the word "property" was used in its broadest sense; and, keeping in view both the title and the body of the act, it is clear, beyond question, that it was not intended, if a turnpike extended

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through a dozen counties, that one of them should derive the benefit of the revenue arising from all of it simply because its officers happened to live there.

Not only the language of the act (which must be first looked to for its meaning), but its subject-matter and spirit forbid any such construction.

The taxation by the county of so much of such a road as lies within its borders will in no way impede its proper use by the owner or the public; and instead of any rule of policy forbidding it, the rule requiring at least approximate equality of taxation upon all property not specifically exempted demands that it should contribute its proper proportion of the burden necessary to support the local government.

There is no law exempting it, and in the absence of any the general rule that all property is liable to taxation for both State and county purposes must prevail.

The judgment is affirmed.

D. L. Thornton for appellant.

Ira & W. H. Julian for appellee.

VAN BIBBER'S ADM'R, &c. v. VAN BIBBER.

(Filed December 11, 1884.)

Insurance—Death of beneficiary—A took out a policy in a benevolent insurance company in which he designated his brother as the beneficiary. The brother died before A. Held—That upon A's death the proceeds of the policy were not payable to the brother's personal representative or distributees, but to the widow of A.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

On November 5, 1879, O. Van Bibber became a member of the corporation known as the "Presbyterian Mutual Assurance Fund."

His application for membership directed that "the sum due at my death I desire to be paid to my brother, Harvey Van Bibber;" while the certificate of membership provided that

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the benefit, if not exceeding $2,000, should, upon his death and the surrender of the certificate, be paid "to such person or persons as he may designate by will or upon the books of this corporation."

By an entry upon the company's books also Harvey Van Bibber was designated as the beneficiary. He died on March 7, 1880.

On March 11, 1880, O. Van Bibber by letter requested the company to enter his wife's name upon its books as the beneficiary, and it did so and furnished him a certificate of the fact. He died on May 26, 1880, intestate and childless.

The benefit is now claimed by his widow, E. L. Van Bibber, by the administrator of Harvey Van Bibber, and also by his sisters, he having died unmarried and intestate.

The said administrator also seeks, in the event he is not entitled to the entire fund, to recover so much of it as will pay what he alleges was owing his intestate by O. Van Bibber, upon the ground that the insurance had been effected to secure it and was in pledge for it.

The fourth section of the company's charter provides: "The object of this corporation is to create and provide a beneficiary fund for the families or relations of deceased members, or for the benefit of members in sickness."

The sixth section says: "Upon the decease of any member of this association the fund to which his family is entitled shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go—

1st. To the widow and infant children.

2d. To his mother and sisters.

3d. To his father and brothers.

4th. To his grandchildren.

5th. To his legal heirs.

"Section 7. The fund due deceased members shall not be subject to the claims of creditors, and shall not be reached by

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attachment, garnishment, or other process of law, so as to divert from the family of such members."

The above are all the provisions of the charter that bear upon the questions presented by this appeal.

A beneficiary under an insurance policy must have an insurable interest in the life of the insured. It is well settled, however, that a creditor has such an interest in the life of the debtor, while upon the other hand a mere wager policy is void. (Bliss on L. Ins., section 27; Conn. M. L. Ins. Co. v. Schaefer, 94 U. S., 457.)

In this instance, however, there was no power to insure for the benefit of a creditor, or to pledge the policy to secure a debt.

The seventh section, supra, forbids it. The legislature created the corporation for purely benevolent purposes. The object in view was the benefit of the family of the deceased member, and it would be defeated if the insurance fund were liable for the debts of the insured.

It would be idle to permit a pledge of the policy when the contract could not be enforced, or to give a right and withhold the remedy. (Ky. Masonic Mut. L. Ins. Co. v. Williams' Adm'r, 13 Bush, 489.)

It is, however, really unnecessary to discuss this question, or whether any debt was in fact owing or enforcible, or any pledge attempted; or whether the lower court ruled correctly upon the exceptions to the testimony, owing to the conclusion we have reached upon another question which is in advance, and is decisive of the case.

It is a general rule as to an ordinary life insurance policy that the person originally designated in it as the beneficiary is entitled to the benefit; that the right to it vests in him the moment it is issued, and that neither the insured nor the insurer can change it to the detriment of this third party.

This rule applies to policies issued by mutual benefit associations, and must govern in this instance unless the charter provides differently.

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The certificate of membership constitutes the contract, but it is to be construed and governed by the company's charter.

In fact it may be said that the charter is a part of the contract; and if it declares who, in a certain event, shall be the beneficiary, the parties can not alter this legislative direction, because neither the company nor the insured can do anything in violation of it.

It is necessary to keep in view that it was certainly the main object of the legislature, if indeed it was not its sole one in this instance, to provide for the member of the company in case of his sickness or for his family in the event of his death.

This intention would, therefore, be defeated if a stranger could be named as the beneficiary, and the fund pass to his representatives upon his death.

It is, however, urged that in this instance the beneficiary was a brother, and that under the charter the "relations" of members might be provided for as well as their "families."

The sixth section of the charter, however, fixes to whom the benefit is to be paid. As showing the legislative intent it first speaks of it as "the fund to which his (the member's) family is entitled."

It then provides that it shall be paid as may have been designated in the application for membership; but if this be impossible, by reason of death or otherwise, it must be then paid to the persons and in the order as enumerated in the section. The death alluded to is certainly that of the designated beneficiary; and the language leads irresistibly to the conclusion that it was intended that, in order that the beneficiary might take, he must be a living person at the time of the death of the insured.

The words "this being changed by death" certainly mean something; and if the benefit goes to the representatives of the decedent, who was named as the beneficiary, they were needless, as the fund would have so passed without them.

It is urged, however, that the persons named in said section, who take in the event of the death of the beneficiary, are his wife and his relations, and not those of the insured.

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It is hardly to be supposed that the law-making power would have so carefully enumerated the persons who were to take in the event of the death of the beneficiary, if it was intended that the fund should pass to his line; while, upon the other hand, this is entirely natural and reasonable if it was intended that it should go to the line of the insured. This conclusion is fortified by the fact that by the order of payment named those persons who were first entitled to the regard of the insured and who were most likely to need aid were first named.

For instance, the sisters take in preference to the brothers; and this particularity would not exist if the fund had to pass to the representatives of the beneficiary, who was not a member of the association.

The death of the beneficiary "changed" the designation of the fund; and then the charter gave it "as a benefit" to those who depended for their support upon the life of the member for whose benefit the law was enacted.

The assured had the power to designate a relative and creditor as the beneficiary; but as he died before the death of the insured, the designation was "changed by death," and the fund could not be paid as designated in the application for membership; in which event it passed to the widow of the party intended by the charter to be benefited.

It is unnecessary to decide whether the insured had the power to name another beneficiary after the death of the one named in the application for membership, as the one he did name is the same person who was first entitled to the fund under the company's charter in the event of the death of the beneficiary named in the certificate of membership.

Judgment affirmed.

B. W. Duke and John B. Baskin for appellant.

Ward & McAfee for appellee.

HALDEMAN, &c. v. AINSLIE, &c.

(Filed November 29, 1884.)

Corporations—Liability of directors—Debts in excess of charter limit—A corporation was organized by each member subscribing for 400 shares of

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stock of the value of $100, for which he paid only $1,500. The articles of incorporation provided that the indebtedness should not exceed a certain sum. Held—(1.) Each stockholder is liable to the creditors for the balance unpaid on his stock, even though the debt be in excess of the limit, if the creditor did not know that such a limit was fixed. (2.) The corporation becoming insolvent and the officer contracting the debt having paid it off out of his individual means, Held—He can not afterwards claim contribution of the stockholders unless the latter unanimously and by direct vote authorized the making of the debt in excess of such limit.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The present action in equity was instituted in the Louisville Chancery Court by Edwin Thompson and a number of banks in that city, and by Ainslie, Cochran & Co., as plaintiffs, against Haldeman and others, defendants. During the progress of the action the appellee, Mrs. George Ainslie, as the executrix of her husband, having paid off the debts asserted by the banks and Thompson against the defendants, was made the real plaintiff in interest, and the litigation resulted in a judgment for Mrs. Ainslie against the appellants, and also in a judgment in favor of Ainslie, Cochran, &c., who were the surviving partners of the firm of which Mrs. Ainslie's deceased husband was a member.

The matters in controversy originated from a settlement of the assets and liabilites of a corporation styled The Great American Fire Extinguisher Co. The article of subscription was executed in October, 1873, under which the corporation was formed for the purpose of manufacturing and selling this patent fire extinguisher.

The capital stock was $1,200,000, and each subscriber, upon executing his note for $1,000, payable in bank and paying $500 in money, as provided in the fifth section of the articles of association, became entitled to a paid-up stock of four hundred shares, valued at $100 per share, in other words became entitled to $40,000 of stock in the corporation.

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By section 6 of the act of incorporation it is provided that "the highest amount of indebtedness or liability which this corporation is at any time to subject itself shall be the sum of $15,000." And by section 7: "The private property of stockholders shall be exempt from liability for the corporation debts of this company."

The company was organized with B. F. D. Fitch as president, and George Ainslie, I. F. Bullitt, B. Dupont and others directors. The company, it seems, had a business existence only from early in the year 1874 until November, 1875, at the end of which time it became evident that the patent was a failure, and by some resolution of the stockholders or transfer by the board of directors with their sanction the assets of the corporation were transferred to the Babcock Fire Extinguisher Co., and the directory required to wind up the affairs of the company.

When the corporation dissolved or became bankrupt it was discovered that its indebtedness amounted to over $33,000. On the paper to the banks, which constituted the greater part of this sum, George Ainslie, the deceased, had made himself personally liable, as endorser or otherwise, in fact for the entire amount except $3,070, a debt incurred with the firm of Ainslie, Cochran & Co., of which the deceased, George Ainslie, was the active member. The assets of the insolvent corporation when transferred to the Babcock Co. were valued at $23,750, and for these assets the latter company gave $28,000 in its bonds and a large quantity of its stock, and what has become of these bonds or the stock does not distinctly appear, but it is developed in the record that the Babcock Fire Extinguisher Co. soon became insolvent, and its stock and bonds may be worthless. Mrs. Ainslie, as executrix of her husband, paid off the debts for which her husband was personally liable, and has sued the other members of the corporation, who are the appellants here, for contribution. Having obtained a judgment below the defendants are appealing from that judgment. The principal defense made by the appellants is that the president of the corporation, Fitch, and George Ainslie, the decedent, a direc-

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tor, without the consent of the members of the association and without any authority from the board of directors, created this large indebtedness in direct violation of the terms of the charter.

To what extent the directors or any members of the corporation participated in the creation of these debts is not made manifest by the record, and the only parties to the original agreement who seem to have incurred the liability are George Ainslie, the decedent, and Fitch, the president. We find upon an examination of the minutes of the corporation no express authority given anyone to create these debts, and while the work and material for the construction of the extinguisher was done and furnished by the firm of Ainslie, Cochran & Co., from which the liability of the company might arise, we see nothing in the form of a resolution by the board of directors or direction given any member of the directory or the corporation to incur liabilities in excess of the amount fixed by the charter. The effect of the limitation upon the amount to be paid by the subscribers for their stock would not exempt them from liability to a creditor who had dealt with the corporation in ignorance of the articles of association limiting the amount of the indebtedness to be created by the corporation or those conducting it. In this case the subscriber of stock obtained four hundred shares of stock, valued at $100 per share, for $1,500. They paid $30,000 for the patent right, and had $15,000 of working capital. The public had the right to believe that each subscriber taking 400 shares of stock at $100 per share had either paid up this stock or was liable for the amount, and when trusting the corporation upon the faith of its ability to pay, and without any knowledge as to the restrictions contained in the contract between the stockholders, a creditor of the corporation could compel the payment of the entire stock if necessary to satisfy his demand. In this case we think it clear that the banks could have recovered of the stockholder for the reason that those conducting the business of the corporation had created these debts for the benefit of

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the corporation. The banks could have sued any of the parties to the bills, and required the individual members of the corporation, by a proceeding in equity, to pay up their stock in order that the debts might be satisfied.

The doctrine as stated in Hall v. Upton, 12 Otto, will not be controverted, and that is "where one has become bound as a susbcriber to the capital stock of a corporation he must pay his subscription, if required, to meet the obligations of the corporation."

The question presented in this case is, how or by whom were these debts contracted? If by Fitch or Ainslie, in violation of the charter, and they, or either of them, subsequently paid off the debts, then it is maintained by the appellants that no right to contribution exists.

It is plain that the parties to this association were endeavoring to protect themselves from liability when they inserted section 6, providing that "the highest amount of indebtedness or liability which this corporation is at any time to subject itself shall be the sum of $15,000." This section is certainly not meaningless, and when the board of directors or any member of the corporation violates this provision of the charter, and seeks to make the stockholder personally liable, the consent of the stockholder must be shown or the liability will not attach. As between the stockholders it can not be said to be a corporate act, and neither the board of directors nor a majority of the members can make the individual stockholder liable in such a case, although they may remove the limit by a majority vote. It is a contract between them that no member or a majority of the members can repudiate so as to create a personal liability as between each other in excess of what they have agreed to pay. The restriction as to the liability for an amount less than the stock is binding between the parties. The case in 22 Beavan, 143 (In re Norwich Yarn Co.), turned upon the construction of the deed, and it was there held when the debt had been created in good faith, in considering the whole instrument it could not be said that the directors are to personally bear the loss, and no portion of it

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to be paid by the other proprietors. The clause of the writing in that case is unlike this, and in ascertaining its meaning the court said that it was not intended to limit the liability. Mr. Lindley, in his work on Partnership, criticises the case of the German Mining Co., 4 De G. M. & G., 19, where it was held that directors might recover of the shareholders, although they had borrowed money in violation of the charter, by saying that courts have gone too far in allowing the credit of limited associations to be pledged by the directors. "It is difficult to understand the correctness of this view (the liability of the shareholder to the director), or to see how that which, as between the directors and the shareholders is a clear excess of authority, can, as between the same persons, be deemed warranted by any trust." Again: "It is not a little remarkable that whilst courts have gone great lengths in protecting shareholders against bona fide creditors, by making them look to the powers of the directors, comparatively little protection is afforded to shareholders against bona fide directors." (Lindley on Partnership, page 764.)

The doctrine maintained by the appellees is there repudiated unless the acts of the directors are approved and adopted by the shareholders, and then only such as ratify their action can be held by the directors personally liable or be required to contribute. In the case of Scovill v. Thayer, 105 U. S., 105, the stockholders agreed among themselves to pay 20 cents on the dollar of their subscriptions and receive full paid stock therefor. It was held that as between them and the company this was a perfectly valid agreement.

In the case of the Worcester Corn Exchange Co., 3 De G. M. & G., 180, where a joint stock company undertook to build a common exchange, the expenditures therefor being limited. At a general meeting held after the formation of the company the directors reported that the subscribed capital was not sufficient to defray the expenditure, and by a subsequent report it was stated "that each shareholder will be required to contribute

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a larger sum than he has already susbcribed." The directors advanced moneys from their own pockets and borrowed of others to pay the creditors of the joint stock company, and when seeking to recover of the shareholders the Lord Chancellor said: "This is a distressing case. There is no suggestion whatever as to mismanagement or misconduct on the part of the directors. It is quite clear that as between the shareholders and the directors all that is to govern their respective liabilities is to be discovered in the deed which they have entered into; that alone must regulate their rights inter se."

It was also held in that case, when discussing the liability of the shareholders as to third parties, that a bank of which some of the money had been borrowed could not recover because the bank had clear notice of the stipulations of the deed and of the limited liability of each shareholder, as one of the partners in the bank was a shareholder in the company. That case is similar to the case before us.

In that case the shareholder had agreed to pay a certain rate on each share and no more, and the court held that the deed was the contract between the parties to it. That being the contract the directors have no power to violate it.

If the amount paid by each subscriber of stock in the present case had constituted its full value and included all the shares of the corporation, and the directors, or Ainslie & Co., had advanced moneys in addition to the capital stock, it might be contended, with as much propriety as is maintained here, that the stockholders would be liable because the necessities of the company required the expenditure, and the shareholder was deriving the benefits.

The answer to either question is, that the charter is the contract between the shareholders, and no member of the corporation can violate it, whether president or director, by making an unauthorized expenditure, unless approved or directed by the shareholders.

This brings us to the consideration of the question as to whether the stockholders in this case or the directors authorized

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the creation of these debts or ratified the action of those who contracted them after they were made.

The directors in this case claim that they are not liable, and it is plain that the shareholders can not be held responsible with the proof before us. We find nothing on the books of the corporation authorizing anyone to contract debts for and on behalf of the company, but assuming as Ainslie & Co. were entrusted with the manufacture of the extinguisher, and that Fitch and Ainslie, the latter of whom was a member of that firm, and also, the one the president and the other a director of the association, had the authority to manufacture and sell the extinguisher and to incur the expenditure therefor, it can not be said that they had the implied power to go beyond the limits of the charter and involve the corporation, without the consent of the stockholders, in financial trouble. It is evident that these bonds did not make the corporation their debtor without the intervention of some of the parties connected with it, and whenever the notes evidencing these liabilities appear they are found to be executed or indorsed by Fitch as president of the corporation and Ainslie in his individual capacity. It is a conceded fact, or, if not, the evidence is conclusive that Ainslie obtained this money upon his credit, and the proof conduces to show that it must have been used in the manufacture of the extinguisher from which the company, of which he was a member, expected to derive the benefits. The president and secretary of the corporation have both testified in this case, and there is neither a statement from them nor an exhibit filed from the books of the company showing any direction or anything from the board of directors or from the individual stockholders to Fitch and Ainslie to create these debts, nor had the board of directors or a majority of the shareholders the power to increase the liability of the corporation beyond the limits of the charter; if so, we see but little necessity in having a charter as the organic law of such associations. To adjudge otherwise would leave the shareholder at the mercy of the board of directors, who, if not controlled by the charter, could exercise unlimited power.

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In this case, if the board of directors had authorized the creation of the debts in express terms, it would not be a corporate act because in excess of the authority conferred by the charter. The unanimous vote of the shareholders could alone authorize the act so as to bind the corporation or the shareholders.

"Shareholders in a limited liability company can not be compelled to contribute more than the amount of their shares, either for the purpose of indemnifying directors or for any other purpose." (Lindley on Partnership, page 768.)

It can not be maintained that directors have the power to create a new liability or increase the amount for which the shareholder has agreed to become bound by an express agreement, for no other reason than that the interest of the corporation required the expenditure. An act in excess of corporate power "can be ratified only by the unanimous consent of the shareholders. In such case even the majority can not ratify the act in behalf of the company, for the powers of the majority are derived wholly from the charter itself. The distinction between the delegated authority of a majority and the corporate authority granted by law is of much importance on account of its bearing on the validity of corporate acts. In the one case the doctrine of the law of agency applies, while in the other case the question is as to the legal effect of a statutory or common law prohibition. In the former case the familiar rule applies that an unauthorized act of an agent may be ratified; in the latter it has no application" (Morazwetz on Private Corporations, pages 76 and 84). As to matters within the corporate authority the voice of the majority is that of the corporation, but the rule is otherwise if in excess of the authority or power conferred by the agreement between the stockholders.

While the unanimous voice of all the shareholders would have been sufficient to remove the limit to the liability of each member in this case, we find no such allegation in the pleadings, and, if alleged, no proof to support it, but, on the contrary, the facts conduce to show that the shareholders were not all present at any meeting, and, therefore, could not be held

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responsible, and if any liability exists it must apply to the individual member, who, by reason of his agreement to become bound or his direction to Ainslie or Fitch to create the debts, has assumed a personal responsibility.

The only reason for holding the shareholders liable to third parties, who are creditors, would be the publication to the world that the stock amounted to so much and had been fully paid. There was no such acquiescence in the conduct of Ainslie or Fitch as would make the shareholders responsible. The organization lasted but a short period from the time it began active business, and in November, 1875, when the insolvent condition of the company became apparent, and its assets were transferred to the Babcock Co., this indebtedness had already been created by Ainslie and Fitch, and the only alternative left the shareholders was to dispose of the assets and wind up the corporation, or assume the liabilities incurred and proceed with the enterprise. The effect of the meeting in November, 1875, was to appropriate the assets to the payment of the corporate debts, and there is nothing, so far as we perceive, indicating any intention on the part of the shareholders to make themselves personally liable.

The direction to wind up the corporation and pass the assets to an assignee for the purpose of paying the debts, or a direction to the directors to proceed as soon as possible to pay off the debts of the company, was not an agreement on their part to pay off $18,000 out of their individual estate, created in excess of the limit made by an express provision of the charter, and should not be so construed. The personal liability of those who united with Ainslie in creating those debts, or who directed him to do so, is not a question involved in this case, and it is certainly manifest, we think, that all these debts were created on the credit of Ainslie, and that as surety of the corporation he was looking to the assets alone for indemnity. He could have expected nothing else, because he knew when he signed this paper the nature and purpose of the limitation as to the liability of each shareholder by the express provision of

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the agreement between them, and while facts might be adduced creating a personal liability on the part of some of the directors or shareholders, there is nothing in the record before us that would authorize such a conclusion or such a judgment.

The report made in January, 1875, showed a debt of $19,000 and assets greatly more than sufficient to pay all the debts, and in less than a year the corporation became insolvent.

The fact that such a report was filed without objection can not work an estoppel or amount to a ratification. The greater part of the debt, in fact nearly all of it, was created after that date, and if Ainslie's liability was for debts already created by the company it should be ascertained who created them, and then, if in excess of the charter, these liabilities (those creating the debts) to Ainslie may arise.

As the case is presented the equities of the banks will not protect Ainslie or his personal representative, as but for Ainslie's action no such equities would have existed. His being a member of the association, with full knowledge of the protection to the shareholder by the charter under which they all derived their power, will preclude him or his representative from asking contribution, either on account of the moneys paid to the banks or on the claim of Ainslie, Cochran & Co., of which Ainslie was an active member. Judgment reversed and remanded for proceedings consistent with this opinion.

Brown & Davie, Gibson & Gibson, T. L. Burnett and T. B. Fairleigh for appellants.

A. P. Humphrey and Barnett & Noble for appellees.

RANKIN v. COMMONWEALTH.

(Filed December 11, 1884.)

1. Witness testifying without being sworn—Continuance—Upon the trial of appellant for murder one of his witnesses testified without being sworn, and without appellant's knowing that he had once been confined in the penitentiary, and before the witness could be recalled and sworn he fled. Held—This was no ground for discharging the jury and continuing the case.

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2. Discharging jury—Failure of witness to testify—It is no ground for discharging the jury in a trial already begun, or for granting a new trial, that a party was surprised by a witness failing to give the evidence expected of him.

3. Witness contradicting himself—Action of Commonwealth's attorney prejudicial to accused—But where a witness for appellant having testified that what he had sworn to on the examining trial was false, and that he had been suborned to it by appellant, but that he had concealed these facts from appellant's counsel because he was ordered to do so by the Commonwealth's attorney, Held—That the action of the Commonwealth's attorney was prejudicial to the appellant, and entitled him to have the jury discahrged and a continuance granted.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having been tried under an indictment charging him with the murder of Martin Cody, found guilty, and sentenced to confinement in the penitentiary for life, appeals.

The homicide occurred after nightfall on the corner of Twelfth and Grayson streets, near to a grocery store and saloon, in the city of Louisville, and there was evidence introduced on behalf of the Commonwealth which tended to show the offense charged was committed.

The first witness introduced for the defense was one W. A. Cain, who testified he saw the first part of the difficulty between appellant and the deceased, and his evidence tended to show an altercation and a threat on the part of deceased to then and there take the life of appellant.

The next witness called for the defense was Ed. Kenedy, who, upon being asked if he had heard deceased say anything about appellant, answered in the negative. He was then asked what he had said as a witness when testifying before the judge of the court upon the application of appellant for bail. But the question being objected to, and the witness not answering, he was then asked if what he then said was true. To that question he answered: "No; Charley Rankin made it up and influenced me to say it. I don't intend to tell a lie." Being again asked what it was he swore to before, he answered that he then swore that he was sitting on the corner of Fourteenth and Madison streets, and Martin Cody came along and stopped

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and said: "Do you see that man?" pointing to Rankin. "I got it in for that man; he insulted my sister. I busted his head with a brick, and the next time I will finish him."

Upon further interrogation the witness detailed circumstantially the time and places where the story for him to swear to, and which he did swear to, was, as he said, made up. And in the course of the interrogation it was developed that the day before he was called as a witness in this case he and his mother together went to the office of the Commonwealth's attorney and informed him that what he had sworn to upon the motion for bail was false. But he never, before being introduced as a witness on the trial, informed anyone besides his mother and the Commonwealth's attorney. And when asked by defendant's counsel why, as he had led them to believe what he previously swore to was true, he did not come and let them know it was false, the Commonwealth's attorney interposed and said he told the witness not to do it, adding that he wished to show the methods of the defense.

Thereupon counsel for the defense moved the court to discharge the jury and continue the case, and in support of the motion filed an affidavit by appellant. In that affidavit he stated substantially that he was surprised by the statement and conduct of the witness Kenedy, who before being summoned voluntarily gave information to appellant's counsel of what he subsequently stated upon the motion for bail, and he (appellant) fully believed that said statement was true, and had not the slightest knowledge it was false, or any information before the witness was sworn on this trial that he would swear it to be false; that the Commonwealth's attorney, with full knowledge before the witness was called that his testimony was false, told him not to so inform appellant's counsel. He further stated that he believed, if the opportunity was offered him by a continuance, he could show that the witness, Kenedy, had been induced to change his testimony, and that without fault upon his (appellant's) part he had been put to great dis-

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advantage, and could not safely continue the trial before the jury then empaneled.

On the next day of the trial appellant's counsel asked that the witness Cain might be recalled. But the witness failing to appear counsel for appellant stated to the court that since the adjournment of court they had ascertained that he testified falsely in his answer to the question whether he had been in the penitentiary, and they, therefore, felt it to be their duty to make the statement to court, and they had already done so to the Commonwealth's attorney.

The Commonwealth's attorney thereupon moved to expunge the testimony of the witness Cain from the record, stating that he was informed he testified without being sworn. And the motion not being objected to the evidence was by the court directed to be withdrawn. But subsequently it was directed by the court to remain for the consideration of the jury, and they were instructed to consider it.

Appellant's counsel again moved the court to discharge the jury and continue the case, and in support of the motion he filed an affidavit stating in substance that he had no knowledge before the witness Cain testified that he had not been sworn, or had been in the penitentiary, and that he had, by the flight of the witness before being discharged, been deprived of the benefit of his testimony given on oath.

Both motions for a discharge of the jury and continuance were overruled by the court.

Although the conduct of the witness Cain was calculated to have an influence upon the minds of the jury unfavorable to the defense, we do not think that was a sufficient ground for discharging the jury and continuing the case. For, in the first place, it was not the fault of the Commonwealth that the witness was permitted to testify without being first sworn, even if such was the case, nor that he fled before being discharged by the court: and, in the second place, his whole testimony was before the jury, and appellant got as full benefit of it as if he had been sworn.

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But the question arising upon the other motion is more serious.

It is a rule sanctioned by both reason and authority that a party is not entitled to a new trial on the sole ground of surprise, occasioned by a witness whom he has called failing to give the evidence, or giving evidence different from that he was expected to give. And that rule is as well applicable on a motion to discharge the jury and discontinue a trial already begun as on a motion for a new trial.

In every such case it should be made to appear that injustice or injury has resulted to him without his fault, which might be remedied by a continuance or new trial, as the case may be.

It is not made to appear by the affidavit of appellant or otherwise that a continuance of the case would or could have resulted in supplying the evidence which he expected from the witness Kenedy, nor that he went into the trial relying upon the evidence of Kenedy in the absence of another witness, by whom he could at another trial establish the same fact.

It, therefore, follows that appellant was not entitled to a continuance of the case upon the ground of the injury done to him by the failure of the witness Kenedy to give on the final trial the evidence he was expected to give, and which, from his testimony upon the application for bail, appellant had reason to believe he would give.

But in all criminal prosecutions the accused is, under the Constitution, entitled to a fair trial by an impartial jury, and the grave question arises whether appellant had such trial, and the question is also presented whether he has been deprived of it by the conduct of the Commonwealth's attorney.

That the mind of the jury were, by the conduct and statements made in their presence by the witness Kenedy and the action of the Commonwealth's attorney, prejudiced against appellant to such a degree as to deprive him of a fair and an impartial trial we think is manifest.

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Susbequent to the introduction of the witnesses Cain and Kenedy, one or more witnesses testified in behalf of appellant, whose evidence tended to show that he killed the deceased, if not in self-defense, under such circumstances as the jury might have concluded reduced the offense charged to the degree of manslaughter. But the conduct and statements of Kenedy had a tendency to throw suspicion upon the honesty and good faith of appellant, and the integrity of all the witnesses thereafter introduced by him, and to prevent the jury from impartially considering their evidence.

Whether or not it was the duty of the Commonwealth's attorney, when told by Kenedy he had sworn falsely upon the trial of the question of bail, to give the information to appellant's counsel, and thereby prevent them being entrapped by a perjured witness, is a question of professional courtesy which it is not the province of this court to decide. But he had no right to compel the witness to conceal the information from appellant's counsel; for inasumch as the witness, after making the confession, was at the will of the Commonwealth's attorney, subject to indictment and punishment for perjury, the request was equivalent to a command he dare not disobey.

Thus is presented the startling fact that by the exercise of official power that which it was essential to the defense of appellant for his counsel to know, and they had a right to know, was purposely kept concealed from them and him.

It is not necessary to speculate whether Kenedy would, but for the action of the Commonwealth's attorney, have given the warning it was his duty to give to appellant's counsel or not, for the latter himself states the reason Kenedy did not do so was that he told him not to do it.

There is nothing in the record which shows that appellant, directly or indirectly, suborned the witness Kenedy or attempted to do so. On the contrary he states in his affidavit that he believed Kenedy's testimony upon the motion for bail was true. But the result was as disastrous to him as if he, instead of his son, Charles Rankin, had been charged with doing it,

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particularly after the unnecessary and ill-timed remark of the Commonwealth's attorney that his object in telling the witness not to inform appellant's counsel he would not testify as he had previously done was to show the methods of the defense.

Not only were appellant's counsel thus entrapped, but he was made to suffer for alleged misconduct of his son, illegally and wrongfully put in evidence before the jury, which he is not shown by the record before us to have been at all cognizant of or responsible for.

In our opinion the court erred to the prejudice of appellant's substantial rights in not sustaining the first motion to discharge the jury and continue the case.

Wherefore, the judgment is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion.

Kinney & Kinney, Baker & Atchison, L. G. Munford and H. Clay for appellant.

P. W. Hardin, A. G. Caruth and R. J. Breckinridge for appellee.

DAWSON v. LEE.

LEE v. HILL.

(Filed May 27, 1884.)

1. Surety—Signing name—Authority to another to sign one's name as surety to a bond must be given in writing and signed by the surety in person.

2. Recovering debt from principal—A surety who pays a debt for which he is not liable can not recover it of his principal, nor subject land sold by the principal to a third person, although a lien may have existed on the land for the debt.

3. Constitutional law - Common schools—Negroes—The act of February 23, 1874, for establishing a separate common school fund for colored children, is unconstitutional. A sheriff has no power to collect any tax under it, and his sureties are not liable to the State for sums so collected.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellant Dawson and appellees, Hill and Greenwell, to subject a tract of land owned by J. A. Lee to the payment of $—, one-third of which they each, as alleged

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sureties in a revenue bond given by J. H. Hayes, sheriff of Bullitt county, paid into the treasury of the State.

Upon final hearing personal judgment was rendered in favor of each of the plaintiffs in the action against Hays for the sum of $824.14, subject to certain credits mentioned, and the land was directed to be sold to satisfy, first, a debt in favor of Simmons, secured by mortgage executed prior to the revenue bond; and, second, to pay the claims of Hill and Greenwell. But it was adjudged that Dawson is not entitled to a lien upon the land, and the petition, so far as it sought to sell it to pay his claim, was dismissed.

From the judgment Dawson and Lee have prosecuted separate appeals. But as the questions involved are connected and only one transcript is presented they will be heard together.

As the sale and conveyance of the land in controversy by Hays to Lee was made in April, 1881, after the execution by Hays and his sureties of the revenue bond, which was done the first Monday in January, 1880, it is manifest the lien of the Commonwealth was created and existed before Lee acquired title to the land, and that those of the plaintiffs who were bound as sureties are entitled by substitution to a lien on the land for whatever amount they have been compelled to pay into the treasury of the State by reason of the default of the sheriff.

But it was alleged by the defendant, Lee, that Dawson never, in the manner required by law, executed the revenue bond, and was not legally bound as surety to pay any part of the revenue into the treasury of the State, and that such payment by him was voluntary, and gave him no right to the lien held by the Commonwealth upon the land purchased by Lee of the sheriff, Hays.

It appears that the name of Dawson was signed to the bond without his presence by the clerk of the county court in a pursuance of authority contained in a paper purporting to be a power of attorney executed in presence of one Kinnison, who signed Dawson's name and his own as an attesting witness.

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Section 20, chapter 22, General Statutes, is as follows: "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing signed by the principal; or if the principal do not write his name, then by his sign or mark made in the presence of at least one credible attesting witness."

"The language of the section seems to be imperative and without exception that in all cases of suretyship, in order that the act of one may bind another as surety, such act must be done under written authority from the one held to answer as surety." (Bilington v. Commonwealth, 79 Ky., 400.)

In that case the name of the surety was signed, not to a power of attorney, but directly to a bail bond, in presence of the judge of the court who accepted the bond, and in presence of the surety and by his direction. Yet not being signed by the surety in person, but by his attorney, he was held not to be liable.

One of the objects for which the statute was enacted was to correct the evil growing out of the loose practice of those whose duty it is to take official and bail bonds. And it can not be properly construed otherwise than has been done in the case referred to.

It being then clear that Dawson was not legally bound as surety upon the revenue bond executed by Hays, the sheriff, and that the payment made by him into the State treasury was voluntary, is he now entitled to a lien by subrogation upon the land of Lee, the purchaser, in order to idemnify himself?

"The general principle that no one can make himself the creditor of another without his consent or against his will is familiar. But when one is surety for another and pays the debt which the principal owes the law implies that the latter requested such payment to be made, and also implies a promise to repay him. But the surety must be under some legal obligation to pay, otherwise the implication of a request to pay and promise to pay will not arise." (Kimble v. Cummins, 3 Met., 327.)

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In that case an execution upon a replevin bond, in which Cummins was the surety of Kimble, being issued and levied upon the property of the former, he satisfied the debt, and then, by an action in equity, sought to subject certain property of his principal to reimburse himself. But as more than one year had elapsed from the maturity of the replevin bond until the issual of the execution which Cummins satisfied, he was by statute released from all liability upon the bond, and consequently, as held by this court, he could not pay the debt and look to his principal for reimbursement. For after his release he was no longer a surety, and, therefore, not entitled to any of the rights growing out of such relation.

In the case of Spillman & Duff v. Smith, 15 B. Mon., 134, the same principle was held applicable where the surety in a sale bond satisfied it after he became released from legal liability.

It was thus determined in both those cases, and we think correctly, that a surety in a bond who satisfies it after he has been released as such "occupies no better attitude than that of any other person paying the debt of another without request or authority, implied or expressed." And that a mere stranger or volunteer who pays the debt of another can not be substituted to the creditor's rights is a proposition too plain and well settled to argue.

The contest here, however, is not between a surety and his principal; but a party is seeking to subject the land of a vendee to reimburse himself for the payment of a debt of the vendor that he never was legally liable to pay as surety or otherwise.

If he could not pay the debt after being released as surety by operation of law and look to the principal, as was held in the case of Spillman & Duff v. Smith, it would seem reasonable that he should not be permitted to reimburse himself out of the land of a purchaser for the payment of a debt of another that he was never bound for at all.

Whether the vendee in such a case has or not been benefited to the extent of the payment made is not a material question.

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He may or may not have had sufficient security or indemnity against a breach of contract by his vendor. However, whether he had or not, it is sufficient to relieve his land from a lien in such cases, that the party asserting it occupies the attitude of a mere stranger or volunteer.

Upon the cross appeal of Lee from the judgment in favor of Hill and Greenwell various questions are presented:

1st. It appears that after he purchased the land Lee paid to Hays a considerable amount of the purchase money, which the latter as sheriff paid into the State treasury in part discharge of his revenue bond for 1880, and got credit therefor. Inasmuch as the money paid by Lee was accepted and so appropriated by the sheriff, and the sureties in the bond were to that extent relieved from responsibility, Lee is entitled at least to share pro rata with them in the proceeds of the sale of the land. But he is not entitled to priority. For the lien in favor of the Commonwealth, to which the sureties are entitled by substitution, already existed when he made the payment to Hays.

2d. As Lee had no notice at the time he made the improvements on the land that Hays had defaulted as sheriff, and they are shown to have been necessary and made in good faith, we think he should be reimbursed therefor out of the proceeds of the sale to the extent they are shown to have increased the vendible value of the land before appellees, Hill and Greenwell, are paid.

3d. It appears that included in the amount with which Hays was charged as sheriff by the Commonwealth on account of revenue collected by him for the year 1880 was the sum of $154.28, taxes assessed and collected from negroes in pursuance of an act, entitled "An act to establish a uniform system of common schools for the colored children of this Commonwealth." Approved February 28, 1874.

If that act be repugnant to the Constitution of the United States the sheriff was not authorized to collect any money in pursuance of it, nor required, after he did collect, to pay it into the State treasury, because the Commonwealth of Kentucky

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was not entitled to it. And having no right to it the Commonwealth held no lien therefor which the sureties of the sheriff could, by susbtitution, enforce against the land of Lee.

It has been held by the Supreme Court of the United States that discriminating legislation by a State against any class of persons, or against persons of a particular race or nation, in whatever form it may be expressed, deprives such class of person or persons of such particular race or nation of the equal protection of the laws, and is prohibited by the fourteenth amendment to the Constitution.

By section 1, article 11. of the State Constitution the "common school fund" therein designated, together with any sum which may be raised in the State by taxation or otherwise for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools.

If the rule adopted by the Supreme Court in all other cases involving the construction of the fourteenth amendment to the Constitution be applied in the matter of the common school system of this State, it follows that State taxation for purposes of education should be provided for by general laws applicable to all classes and races alike, and that all the children of the State are entitled to an equal share of the proceeds of the "common school fund," and of all State taxation for purposes of education.

The object of the act in question, as declared therein, is to create a uniform system of common schools for the education of the colored children of the State. And the fund for that purpose is provided for by taxation upon the property and persons of the negro race exclusively.

It was obviously the intention of the legislature, and such is the proper construction of the act, to exclude the negro children of the State from any share of the proceeds of the "common school fund," set apart by the Constitution as well as from the annual tax levied under general laws on the property of white persons for school purposes, and to give them the benefit of only the fund provided for in the special act. In this

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respect, as well as regards the partial and discriminating taxation provided for, the act is, in our opinion, in violation of the fourteenth amendment to the Constitution of the United States as interpreted by the Supreme Court.

Wherefore, the judgment is affirmed on the appeal of Dawson and reversed on the cross appeal of Lee, and cause remanded for further proceedings consistent with this opinion.

R. McConathy for appellants.

F. P. Strauss for appellees.

KENTUCKY SUPERIOR COURT.

TREACY v. COMMONWEALTH.

(Filed December 17, 1884.)

1. Indictment—Libel—Distinct offenses—One indictment may be found against defendant for publishing a libel on two or more persons where the libel was all contained in one writing.

2. Indictment—Certainty—The libel is set out with sufficient distinctness where it is charged that defendant "wrote and caused to be printed and published," without stating whether he published in book, hand bill or newspaper.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bowden.

The indictment against the appellant charges him with libel, specifying that he did "unlawfully and maliciously compose, write, and cause to be printed and published, of and concerning W. D. Nichols, late sheriff of Fayette county, and the jurors before whom the value of a certain landed property was tried on a writ of ad quod damnum sued out at the instance of the Elizabethtown, Lexington and Big Sandy Railroad Co. and against said Treacy and others; and of and concerning J. R. Morton, presiding judge of the Fayette Circuit Court, before whom the issue joined in said writ, and the proceedings thereon had, then and in said court were pending for judicial revision and determination and adjudication, a certain false, scandalous, and malicious libel, one part whereof is of the tenor following;" then setting out matter relating to the conduct of the sheriff and jury in the trial on the writ of ad quod

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damnum, and proceeding: "Another part is of the tenor following;" then setting out matter relating to the conduct of Judge Morton after the writ and verdict had been returned into the circuit court.

The defendant demurred to the indictment, first, because it did not state facts constituting a public offense; second, because it attempted in one count or paragraph to charge the defendant with two or more public offenses. The demurrer was overruled and the trial began.

After introducing evidence to show that the defendant caused the alleged libel to be printed in three newspapers published at Lexington, the Press, the Transcript and the Evening Advertiser, and that he had written the article so published, the Commonwealth's attorney had the witness then on the stand to read the article to the jury. When he had read part of it, all of which related to the conduct of the sheriff and the jury, the defendant objected to the further reading upon the ground that what followed related to the conduct of Judge Morton. The objection was overruled, and the entire article was given in evidence. The instructions to the jury referred to only that part of the article which was charged as a libel on Judge Morton, no reference whatever being made to that part charged as a libel on the sheriff and jury.

The right to join different offenses in one indictment against one or many joint offenders existed at common law, but each offense had to be charged in a different count. The limit to the right to join was that the offenses should be of the same kind, and admit of like plea and of like judgment, though it was not necessary the judgments should be the same (1 Bishop's Crim. Proc., sections 179-187; McChord v. Com., 2 J. J. Mar., 243). Thence came the practice of joining several counts, apparently charging different offenses, though really meaning the same offense, which was thus variously charged in order to meet the possibilities of the proof. It is provided by section 126 of the Criminal Code that "an indictment, ex-

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cept in the cases mentioned in the next section, must charge but one offense: but if it may have been committed in different modes and by different means the indictment may allege the modes and means in the alternative." While at common law different offenses could be joined in distinct counts, yet if more than one offense was charged in one count it was bad for duplicity. It seems that, excepting the offenses named in section 127, the effect of section 126 is to make the indictment consist of one count only; and, therefore, the old law of duplicity is the law of our single indictment, though the old law respecting joinder of offenses, whether actually or only apparently different, has been replaced by these sections.

But they leave the question open, just as it formerly was, as to what constitutes a single offense. Whether we take the old law against duplicity, or deduce the law from the prohibition of section 126, we still must determine in every case whether the indictment (the one count) charges only one offense or more than one.

Libel is not one of the offenses mentioned in section 127; were it possible to join two such actual offenses, or to state in different counts two such apparent offenses, it has not been done here or attempted. The question presented is whether a single writing, all of which is published at the same time and by the same act, concerning different persons, in regard to their conduct, disconnected as to time, place and circumstances, is to be taken as one offense, or as many offenses, as there are persons libeled.

Bishop (1 Crim. Proc., section 192, 1st edition), in illustrating the rule which prohibits the joinder of two or more offenses and examining what are two or more offenses within the rule, says: "It is now generally understood that a man may be indicted for the battery of two or more persons in the same count; or for a libel upon two or more persons, when the publication is one single act, without rendering the count bad for duplicity." In support of the text he cites Rex v. Benfield, 2 Burr,

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980; Anonymous, Lofft, 271; Rex v. Jenour, 7 Mod., 400; contra, Rex v. Clendon, 2 Ld. Rayn., 1572.)

Rex v. Clendon, decided in 1730, was on an indictment charging an assault and battery on J. S. and J. N. After conviction the judgment was arrested because two offenses were charged. In Reg. v. Giddings, Car. & M., 684, the defendant was charged with the offense of robbery in assaulting and robbing G. P. and H. P. To the objection that the indictment was bad for duplicity, the court replied that only one act was charged, but if any interval had existed between the robberies the prosecutor should elect. There is no difficulty in conceiving that one single act may put two or more persons in fear at the same time, and constitute an assault on both; or that it may constitute a battery on both; and there is an awkward possibility that a robbery (i. e., the mere taking of the money after the persons are put in fear) may be done by one act. This case decides that if it appears from the indictment that the defendant did but one act, which took effect on two or more persons at the same time, he was guilty of but one offense. That particular indictment was regarded as showing there was but one act. Possibly in Rex v. Clendon the indictment did not show it. There may, therefore, be no conflict between the cases.

In Rex v. Benfield and others, supra, the defendants were prosecuted, by information, for singing songs on the street before the dwelling of Daniel Cooke, with intent to destroy his domestic happiness and the comfort he had in his two children, and to injure him in his business; and with the further intent to traduce the reputation of the children. One of the songs related exclusively to the son, the other exclusively to the daughter, the matters laid to their discredit having no similarity even. Neither song contained any imputation upon the father. The objection, after verdict, that the count charged more than one offense was overruled. The court "looked upon this to be one offense, the gist of the thing is singing these songs in the manner and with the intent charged in the in-

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formation and singing them at the father's door with the intent to discredit him and his children, and to disturb his peace and happiness."

In The King v. Jenour, supra, it was held that as the libel "An East India director has," etc., was applicable to all directors, it was a libel on all, imputing to all the one offense charged, and, therefore, an information for a libel on all was proper. This case does not seem to relate to the question under consideration.

All breaches of the peace are punishable. The publication of a libel on an individual is punished because it tends to produce a breach of the peace. The act of publishing a libel reflecting on many persons certainly does not tend less to produce a breach of the peace than if it reflected on only one. Nor is the punishable act of publication converted into as many acts as there are persons maligned. If they who are defamed seek redress, each must sue alone to recover for the injury done him; just as the son or daughter of Daniel Cook must have sued alone; just as J. S. or J. N. must have sued; but the State does not seek redress for the injury done to the person libeled; it punishes the libeler for his one act of publishing a libel calculated to produce violence. By the common law it was not considered material whether the matter published was true or false, the tendency in either case being to produce a breach of the peace; but the right of the accused to set up the truth of the charge is secured here by our organic law, and it is now only a false statement that is punishable.

The specification that the defendant assaulted and beat A and B may or may not impute two offenses. If there was but one act done there was but one offense; if there was an interval there were two acts and two offenses. As the indictment should be taken more strongly against the Commonwealth, it seems the indictment should exclude the interval; and so it seems that the cases of Clendon and Giddings were mere instances of the application of this rule, the court in the one case considering that the interval was excluded and in the other that it was not.

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A specification that the defendant published one article concerning several persons, with regard to their conduct at different times and places, and about distinct matters, is analogous to a charge of one assault and battery on several persons. In the latter case the offense is committed by a single act done by the defendant, by which each person assailed received a separate and distinct injury in body. In the former the single act of publication inflicts separate moral pain and injury on each of those who are traduced. In either case the impelling motive may have been that those traduced or beaten had given some sort of provocation by conduct not related in time, place, or circumstance. But in both cases the defendant is charged with the act done by him; in one, that by a single act he assaulted several and thus committed a breach of the peace; in the other, that by a single publication he libeled several, and thus did an act tending to produce a breach of the peace.

Our conclusion is that the indictment is not bad for duplicity.

The indictment charges that the defendant "did unlawfully and maliciously compose, write, and cause to be printed and published," etc.

The Criminal Code provides that the indictment must contain a statement of the acts constituting the offense, and that it must be direct and certain as regards the particular circumstances of the offense charged.

In Commonwealth v. Williams, 13 Bush, 267, the indictment charged that the defendant "forged and counterfeited, and caused and procured to be counterfeited, a certain writing," and this was held insufficient as being "no more than a legal conclusion," though it was admitted it conformed to "approved common law precedents." It was considered bad because the Code required that the acts constituting the offense charged should be stated. The indictment further charged, in a separate count, that the defendant "did feloniously, knowingly, fraudulently and falsely utter and publish as true" the same writing charged to have been forged. This was held insufficient—not because the acts constituting the forgery were

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not stated—not because it was no more than a legal conclusion —but because the acts showing that the writing was uttered were not alleged. "How did he utter it? There are various acts that may constitute an uttering of a forged instrument, and the particular acts which the pleader regards as constituting the uttering charged should be stated." It was held necessary to allege the particular acts showing how it was done —the manner in which it was done. It was decided that the common law indictment for uttering a forged writing was not good under the Code. It requires the Commonwealth to allege the particular way in which the defendant did an act that may be done in many ways. The old charge was that the defendant uttered and published, and the very act he did was given in evidence to sustain the charge; but under the Code the indictment must allege the act he did as the act whereby he uttered and published, just as it must allege the act whereby he kills and murders.

It is urged that, tested by the same provision of the Code, this indictment is bad.

The Code provides that if an offense may have been committed in different modes and by different means the indictment may allege the modes and means in the alternative. The common law precedents allege the commission of the crime in all these ways, coupling the ways, as they are specified one after another, by the conjunction and. "It is the same in law to cause a thing to be done as to do it; therefore, a count which charges that the defendant unlawfully, etc., destroyed, and caused to be destroyed, a quantity of potatoes mentioned, is not deemed to contain allegations of two offenses. And it is the usual practice, says Starkie, to allege offenses cumulatively, both at common law and under the description contained in penal statutes, as that the defendant published, and caused to be published, a certain libel that he forged, and caused to be forged, etc." (1 Bishop's Crim. Proc., section 190.)

The allegation that the defendant "caused to be printed and published" is an allegation that he caused some other person to print and publish. The form was employed for no other

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purpose than to express this meaning, it was cumulative, in that, in addition to the charge that the defendant did the act personally and directly, it charged that he did the act mediately by procuring some one else to do it. While this language would not help an indictment for uttering a forged note, the objection being that it did not state the particular act done by the defendant constituting the uttering, it has a substantive value in an indictment for libel because it alleges an act of publication, viz., that the defendant procured a third person to print and publish the matter which he had composed and written. The act of procuring that third person to print the matter was itself a publication; so that even if it were supposed that the word "publish" expresses a legal conclusion, it would be a conclusion supported by the allegation mode, viz., that the defendant composed and wrote the libelous matter, and procured another to print it. The mere exhibition of the writing to the third person so that he could reproduce the words in printed form is a publication, even though the printing was not afterwards done; and, therefore, it can not be necessary to charge the particular form in which the matter was printed, whether in a book, handbill, or newspaper, since the offense was completely committed before the printer had taken a single impression.

The rulings at the trial seem to us to have conformed to this view of the law.

Wherefore, the judgment is affirmed, with damages.

D. G. Falconer, Wm. Lindsay and Mulligan & Beauchamp for appellant.

P. W. Hardin for appellee.

DUNCAN, TRUSTEE, &c. v. CENTRAL PASSENGER R. W. CO.

(Filed December 19, 1884.)

Building covenant—Breach of—Injunction—A owning a tract of suburban land, which he divided into lots, sold one of them to B with a covenant that no other building than a dwelling house should be erected on it. B sold to C without the building covenant (though C knew of its existence in the

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original deed), C began the erection of a stable. But A had in the meantime mortgaged or sold all the other lots without any covenant as to building. Held—Judge Richards dissenting, he was not entitled to an injunction to stop the completion of the stable.

Appeal from Louisville Chancery Court.

Opinion of the court by Presiding Judge Ward.

The appellants being the owners of a tract of twenty acres of land within the corporate limits of the city of Louisville, and the same being suitable for buildings sites, and believing that it would best sell and could be best sold for that purpose, laid off the same by running a wide avenue through it, extending from Baxter avenue on the one side to Barret avenue, and by laying out suitable alleys. The lots were laid off fronting on this central avenue, called Highland avenue, and were fifty feet front extending back to the alley. Appellants claim that they believed, and that it was in fact true, that said property could be best sold for residences and would command the highest price if confined to such use, and that it would enhance the value of all if the property was used for such purpose and fronted on Highland avenue.

That on the 3d day of October, 1873, they sold and conveyed to one Allman lots Nos. 60, 61 and 62, as laid down on said plain, which lots fronted on the south side of Highland avenue and extended back 215 feet to the alley. In said deed "it was agreed between the first and second party that no business, manufacturing or other than dwelling house shall be built on said lot, and no alley shall be run through said property, and no building of any kind shall be put thereon fronting any other way than on Highland avenue or said 24 foot alley."

On the 8th of December, 1873, Allman sold the lot to the appellee. No reservation of the easements or rights named in the deed first above were inserted in that deed. But it appears that appellee had made an effort to buy the property, and that appellant, fearing some such use by it as is hereinafter referred to, refused to sell to said corporation, and it further appears that it had actual notice of the covenants in the deed to All-

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man; so appellee is in no more favorable position than if the covenant was in its deed, or than it would be in if it had bought in the first place, agreeing not to appropriate or use the lot in violation of the covenants before recited.

It is claimed that the appellee, in violation of the provisions of said deed, is erecting, or about to erect, on said lots a stable for cars and horses to be used in its said business, and that the same is in violation of the contract, and will greatly lessen the vendible value of other lots owned by appellants, and hence they pray for an injunction to prevent said use.

Appellee claims that appellants had, long before the commencement of this suit, waived and abandoned and given up the plan of having said land laid off into building lots to be sold for residences. It claims that Highland avenue was only partially opened, that much of the land has been continuously and is now used for agricultural purposes, and that appellants have sold all the property on the south side of Highland avenue, nearly all the property on the north side of the same, and that the part not sold has been by them mortgaged, and that in none of said deeds have they made any exceptions or imposed any restrictions as to use, so that there can be no damage to the appellants as affecting the value of any adjacent property, and that the remedy, if any they have, is confined to a suit in damages for a breach of the covenants named in the deed. This view the court below adopted and dismissed the petition without prejudice.

The allegations of the petition show conclusively that the restriction inserted in the deed was to enable the plaintiff to carry out the plan of selling his property for residence sites, or at least that was the only purpose he could have had as affecting the value, use or enjoyment of the balance of said real estate. The proof is quite as conclusive that the appellants have abandoned said plan, or at least by parting with the title to various and sundry persons without imposing any restrictions whatever have not only rendered the execution of the plan impracticable, but impossible.

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Appellants had, before the sale to appellee's vendor, sold off three parcels of said property, and after the purchase by appellee they continued to sell until they had sold all the lots fronting on each side of Highland avenue except Nos. 12 to 32 inclusive, and these they mortgaged. In none of these sales were there any covenants or conditions as to use; they were absolute and unconditional. It is true that the mortgage and the sale to Caperton were made after the institution of this suit, but they are competent evidence bearing upon the question of a purpose to abandon the plan.

In such a state of case as this the authorities seem to be uniform and conclusive to the effect that no injunction will lie; but the party must depend upon his remedy at law for any damage he may sustain by the breach of the covenants of his deed.

In Duke of Bedford v. British Museum, 2 Mylne & Keene, 552, the facts were very similar to the facts of this case. The Duke of Bedford owned a body of land in the city of London which he laid out in lots. He sold one of the lots to the British Museum, and provided in the deed that the land was to be used only for fine buildings, and certain named kinds of improvements were not to be made. Subsequently he so changed the character of buildings as to render the plan impracticable. An injunction was refused. The court says:

"The question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby waived and abandoned all that control which was applicable to the property in its former state. The question is, having regard to the mutual dealings between the parties with respect to the property as it stood, both originally and afterwards, is it consonant with the principles of equity to interfere at this time of day? Who is it that has created this alteration? The party who seeks to enforce the obligation which applied to the property in its former state. It was perfectly competent for the Duke of Bedford to build, with buildings for trade and commerce in any way that he saw proper, but having done so, can it be said to be equitable or consonant with justice, after

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having surrounded him (the defendant) with buildings, to insist on his remaining in the state in which, by the letter of the deed, the party defendant is bound to preserve? The question is whether a court of equity must not consider how far it is unreasonable to permit a party who has so dealt with the property and so altered its condition to obtain his remedy by the interposition of this court. Considering it in that view, I entertain a strong opinion that this is not a case in which the court ought to interfere."

High on Injunctions lays down the rule thus:

"Where the acts of the feoffer, or those deriving title under him have, so changed the character or condition of the adjoining lands with reference to that conveyed as to render the restriction in the conveyance inapplicable according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law." (Section 1158; also 1159; Hilliard on Injunctions, sections 711 and 712.)

We have been referred to a number of cases by learned counsel for appellant, but none of them meet the question as presented by the facts of this case.

In Tulk v. Moxhay, 11 Beavan, 584, the facts are distinguished from the case of the Duke of Bedford v. The Trustees of the British Museum, and, as we understand the ruling in that case, approved.

In Dickinson v. Grand Junction Canal Co., 15 Beavan, 268, no question of waiver or abandonment was made; on the contrary it is said that the owner of the right, who was asking the injunction, had brought repeated actions for the violation of his right, and had on each and all occasions recovered damages, and in order to put an end to litigation he resorted to his remedy by injunction.

In Hills v. Miller, 3 Paige's Reports, 256, the question of waiver or abandonment did not arise; on the contrary it appears that the suit was brought immediatey after the violation of the covenant of the deed, and the court, in commenting on

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the facts of the case, says that, in the opinion of the court, the proposed infringement was desirable and would enhance the value of the adjacent property, and he could see no reason why the injunction was desired unless it was to settle the rights of the party as to other infringements which might be attempted if this one was suffered. Thus it would seem, admitting that if the party stood by and suffered one violation, even though it might be advantageous in itself, yet it might be construed into an abandonment of the plan.

In Dorr v. Harrahan, 101 Mass., 534, the question did not arise; on the contrary the court says:

"In this case there has been nothing on the part of the grantors bearing any resemblance to acquiescence, and there is no suggestion that they have been guilty of any laches that should interfere with the enforcement of their rights, and the same may be said of the case of Lenzee v. Mixer, ibid, 528."

In the case of Clark v. Martin, 49 Penn. State, 298, the facts were that a party owning two lots situated one on the corner of a street and the other adjacent thereto, and adjacent to a large building which excluded light and air from that side, sold the corner lot and stipulated that no building should be erected on the back end of said lot over ten feet high. The reason for this was apparent. On the first attempt to violate the agreement he sued. The court says:

"It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots, and this element exists in about half the cases cited in the opinion, yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded or about to be, and this may exist in a plan of two lots as well as one of two hundred."

Yet it is a plan after all to benefit adjacent property, and we apprehend if there had been three lots and the party had himself built upon the second lot and then sold it, or had sold it without reservation and it had been so built upon as to obstruct

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light and air from the third lot, he would not have maintained his cause. In that event the case would have been more like the one at bar.

In Trustees v. Lynch, 26 American Reports, 617, it is said by the court:

"It is not alleged in the answer nor was it proved on the trial that there had been any change in the character of the locality, the surroundings of the premises or the occupation of contiguous property or the business of the vicinage which has rendered it inexpedient to observe the covenant, or made a disregard of it indispensable to the practicable and profitable use and occupation of the premises so that it might be inequitable to compel a specific performance of the agreement."

The facts show that the only property in the vicinity used for purposes inconsistent with the agreement was situated across the street from the property in controversy, and it does not appear that the parties to the contract in question, or any of them, ever owned or had any power to control the property, the use of which, in such close proximity, for the inhibited purpose, it was urged, should justify the violation of the contract. But aside from this the argument or reasons assigned by the court to take that case in its allegations and facts outside of the rule contended for shows that the court recognized the rule, and instead of saying that the rule was not sound and did not exist, it decided that that case was not within the rule.

My Brother Richards dissents from this opinion, and since its preparation we have been furnished with the grounds of his dissent. In view thereof it is but just to say that the failure of the court to cite other authors and other cases for the rule contended for was not because such could not be found, but because these were deemed sufficient, and especially so, since, as we understood, all the cases cited for appellee recognize the rule and were not exceptional in law, but in fact. Nor do we understand the dissenting opinion as controverting the rule, but its applicability to the facts of this case. A re-examination of the facts of this case has confirmed the first impression,

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that this case is, in its facts, within the rule. To show that it is within the principles of the leading case of Duke of Bedford v. British Museum, supra, both in principle and fact, we refer to Hilliard on Injunctions, sections 711 and 712; Roper v. Williams, 1 Turner & Russell, 11, 6 R., 18, opinion of the court by Lord Eldon; Peck v. Matthews, 3 Equity Law Reports, 515; Sayres v. Collyer, 24 Chancery Division Law Reports, 184.

The judgment is affirmed.

Alex. P. Humphrey for appellants.

Brown & Davie for appellee.

Judge Richards delivered the following dissenting opinion:

The opinion of the court herein only quotes from two authorities in support of the doctrine announced, viz., High on Injunctions and Duke of Bedford v. Trustees of British Museum, 2 Mylne & Keen, 552. As the former is based exclusively on the latter, we need only examine the one case to ascertain the extent to which the principle should be carried.

In 1675 the Hon. Wm. Russell and wife, being the owners of a large tract of land adjoining the improved portion of London, conveyed seven acres to the Right Hon. Ralph Montagu. The grantors already occupied a lordly establishment on that part of the land retained, and the grantee convenanted to erect a similar one, it being the understanding that there should be but two mansions, such as the nobility occupied, with suitable appurtenances. These improvements were to be erected so as not to shut out from either mansion the view of the open fields or park to the northward. The action for the injunction was instituted nearly a century and a half after the conveyance. The Russell estate had passed by descent and grant through several owners. When the litigation commenced the Duke of Bedford was the owner by purchase. In 1800 the old Russell mansion had been pulled down to make way for streets and buildings erected on its site, and all that portion of the land around the Montagu mansion had been conveyed by the Duke of Bedford and his predecessors, and the respective grantees

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had erected business houses. The trustees of the British Museum having become the owners of the Montagu property attempted to extend their buildings over what had been the garden, and where the original grantee had covenanted nothing should be erected to obstruct the view. The injunction was prayed to prevent their erection. Now it seems to me the court very properly said to the complainant: "You can not under such circumstances come into a court of equity for a remedy which the court never grants except in cases where it would be strictly equitable to grant it." There the very mansion, for whose enjoyment the covenants had been exacted, was torn away and the view of the open fields to the northward had been obstructed by the erection of numerous buildings by permission of those to whom the covenants had passed.

But what are the facts in the case at bar? Here the plaintiffs refused to sell to the defendant for fear the property might be used for car stables. Subsequently Allman applied for the purchase of the same property, and, suspecting he was the agent for the defendant, the plaintiff exacted the covenant in question, by the terms of which no building other than a residence was to be erected. As suspected by his grantors Allman transferred his purchase to the defendant, and the corporation, after the lapse of a few years, commenced the erection of its stables.

Now it seems to me the plaintiffs have done all they could have done to protect themselves against the obnoxious building, unless they had refused to sell that lot to anyone—a sacrifice I apprehend the law does not require. But my brother judges are of the opinion that the subsequent sales of other lots to other parties without exacting similar covenants is a waiver within the principle announced in Duke of Bedford v. Trustees, &c., yet it seems to me the condition of the parties is widely different. It is evident that the real object of the covenant was to prevent the erection of a car stable, but even if the other object stated in the petition (to secure the erection of residences alone) be considered paramount, it does not ap-

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pear that any other buildings than residences have been erected on the other lots. If the grantors were willing to rely upon others not erecting any but residences, why should that release the defendant, especially since none of the other grantees have betrayed that confidence? On the contrary, anyone of those grantees could insist upon the faithful performance of the covenants in the deed under which appellee holds.

Covenants similar to these have become common in modern times, and are necessary for the protection of rights in property. The owner of real estate has the privilege of selling, or selling upon conditions, or not selling at all, as he may deem best; and where a grantee has obtained his conveyance upon conditions that are reasonable, he should be enjoined from violating his covenants except where it would be inequitable to do so. It seems to me that the injunction should have been granted in this case.

Alex. P. Humphrey for appellants.

Brown & Davie for appellee.

WHAT LITERARY MEN THINK OF LAWYERS.

I.

MACAULEY.

Their legal arguments are intellectual prodigies, abounding with the happiest analogies and the most refined distinctions. The principles of their arbitrary science being once admitted, the statute book and the reports being once assumed as the foundations of reasoning, these men must be allowed to be perfect masters of logic. But if a question arises as to the postulates on which their whole system rests—if they are called upon to vindicate the fundamental maxims of that system which they have passed their lives in studying—these very men often talk the language of savages or of children. Those who have listened to a man of this class in his own court, and who have witnessed the skill with which he analyzes and digests

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a vast mass of evidence, or reconciles a crowd of precedents which, at first sight seem contradictory, scarcely know him again when a few hours later they hear him speaking on the other side of Westminster Hall in his capacity of legislator. They can scarcely believe that the paltry quirks which are faintly heard through a storm of coughing, and which do not impose on the plainest country gentleman, can proceed from the same sharp and rigorous intellect which had excited their admiration under the same roof and on the same day.

NEW BOOKS.

Legal and Equitable Rights of married women in respect to their property and persons and their children. By Wm. H. Cord, Esq. 2 Vols. 2d Edition. Kay & Bro., Phila., 1885.

This work is very much like the ordinary law book. All the cases bearing on the question are gotten together and put into a sort of patchwork without much system. The lawyer in this State will, however, find it of peculiar value, as the Kentucky law, statutes and decisions, seem all to have been collected and is given a particular prominence.

The mere opinions of text-writers are of little value, but in the making of law books there is still need and call for considerable original work and ability to be displayed in analyzing and logically dividing the subject-matter of the decisions. Fisher's Digest should be a model for all ambitious law writers. Future law books must be digests and not treatises.

Paragraphs like this (page 17) have no proper place in a law book: "No man's happiness is full orbed until he looks upon the woman who is the elect of his heart and calls her his wife. There she stands before him, with the vows of her love fresh upon her, his ideal woman and all his own, he has chosen her out of all the world. She is his elect, and now she stands in the queenly radiance of her beauty, the tremulous trill of her love-charged voice in his ear, pure as the pearly dew, culti-

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vated, elegant and beaming with intelligence and faith—his wife. If he seeks wealth it is that he may make his home such as satisfies his love for her, his mansion is projected for such architectural effects as may meet her taste, the grounds are laid off upon a plan that will gratify her, statuary, painting and elegant furniture are but the frame of which she is the living and half divine picture," etc. The etc. is his own. He had better have put it after the first sentence and left out what follows.

Transfer of Stock in Private Corporations. By Abbott Lawrence Lowell and Francis C. Lowell.

Seton on Decrees. Forms of Decrees, Judgments and Orders with Notes. By Sir Henry Seton.

Thatcher's Practice. A Digest of Statutes, Admiralty Rules and Decisions upon the Jurisdiction, Pleadings and Practice of the District Courts of the United States. Little, Brown & Co., Boston.

There was recently a trial for murder in which the evidence was so palpably insufficient that the judge stopped the case and directed the jury to return a verdict of "not guilty." A well-known lawyer, however, who wished to do something for the fee he had received for the defense, claimed the privilege of addressing the court. "We'll hear you with pleasure, Mr. B.," said the judge; "but to prevent accident, first acquit the prisoner."

"I am going to get married," said a lawyer, who has a big case for the Widow K., "when I can find a woman with attractions or money enough to tempt me." "Why don't you win Widow K.'s case and then marry her?" "What for?" "Why, for her money." "Her money! Why, she'll have no money when I get through. It would be she who would be marrying me for the money that comes out of the case."

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A gentleman writing from Texas says: "It is singular that lawyers in this State do not attempt to bully witnesses as they do in other localities. I'm told that the reason of it is that a Texas witness would just as soon begin shooting from a witness box as anywhere else."

A lawyer, who combines with the pleasures of "briefing" it those of journalism, recently went up in a balloon with a celebrated æronaut. After the balloon had got into the clouds the lawyer fell out. Horror-stricken the balloonist descended to earth, but only to find the lawyer sitting placidly on the ground writing an article, "How it feels to fall from the clouds." He had fallen on his cheek.

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ABSTRACTS OF CASES

—IN THE—

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Adverse Possession—

Joint owners—The possession of one or two joint owners is the possession of both, and the continued possession of one can not be relied upon to defeat the rights of the other. Gross, &c. v. Houchin. December 9, 1884. Edmonson Cir. Ct. Opin. by Holt, J., Ct. of Ap., aff. L. M. Hazlip for appellant.

Alimony—

1. Judgment for costs—In actions for alimony and divorce the wife can never have a judgment against her husband for her costs; for if she is in fault, and has ample estate to pay her costs she must pay them herself, and is not entitled to a judgment against her husband therefor; and if those conditions do not exist there is no liability on her part to the officers, and hence no necessity for the protection of a judgment.
2. Attorney's fee—In determining the amount to be allowed as a fee to the wife's attorney the court should look both to the pecuniary liability of the husband and the character of the services rendered, and the chancellor, if he deems it proper, can examine the husband to obtain a disclosure of his property, since the matter is one in which the wife has no interest. In determining the value of the attorney's services the fact that many of the depositions taken by him were about trivial and immaterial matters should be considered. The husband should not be unnecessarily oppressed.
3. The attorney may compel payment of his fee by summary proceedings or by execution in his favor. Gordon v. Gordon. December 1, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. Marc Mundy for appellant; J. R. M. Polk for appellees.

Arrest, Order of—

Affidavit to petition—A proceeding for an order of arrest is purely statutory and the provisions of the act by which it is authorized must be strictly followed.

When the plaintiffs in setting forth the grounds for the order of arrest in their petition stated that they believed certain things, and one of

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them in his affidavit to the petition stated that he believed the statements of the petition to be true, the two together amounted only to an averment that the affiant believed that the plaintiffs believed the grounds of arrest to exist, which is insufficient Fonda & Sons v. Field. December 3, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., aff. Muir & Heyman for appellants; C. H. Gibson for appellee.

Assignor and Assignee—

Consideration for assignment—Pleading—In this action to recover on a note held by another under a written assignment which purported a valuable consideration, it was not necessary for the assignee to set out what the consideration was, but, having volunteered to do so, the consideration thus pleaded must prove sufficient to support the assignment.

The defendant having pleaded that the note was assigned to her in consideration of her promise to transfer the interest in certain personal property and a tract of land, and that she had tendered a deed to the land, she is bound to state the facts that make her deed valid. The property being situated in another State, she must allege that the deed is made pursuant to the laws of that State, and the deed must so describe the property that it can be identified. She must also allege that she still owns the personal property she agreed to transfer. An allegation that she owned the property at the time she agreed to sell is not sufficient. Malone, &c. v. Bank of Adairville. December 17, 1884. Todd Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. H. G. Petrie for appellants; Browder & Edwards and J. W. Rodman for appellee.

Commissioners in Chancery—

1. Agreement for Compensation—While the parties to a suit may, after the work is completed, agree with the commissioner as to his compensation, and such agreement will, if just and reasonable, be upheld and enforced, yet a contract made with the commissioner before the work is completed will not be enforced. If the parties fail to agree after the work is done the court should make the allowance as if no agreement had been made.
2. Allowance—Allowances to the commissioner of the Louisville Chancery Court, in so far as they are not fixed by law, are within the sound discretion of the chancellor, and can not be disturbed unless flagrantly unjust.
3. The provisions of section 9 of chapter 75 of the General Statutes apply to the commissioner of the Louisville Chancery Court. Miller, Commissioner v. Mix, Trustee, &c. December 17, 1884. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. on original and cross appeal. Temple Bodley for appellant; R. W. Woolley for appellees.

Consideration—See Assignor and Assignee.

Continuance—

1. Judgment of lower court not disturbed—As any public excitement or prejudice against the accused existing at the time of the trial seems to

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have been created by his own wrongful act, and the court below was the proper tribunal to judge whether, under all the circumstances, the trial ought to be had, this court can not review its action in this respect. Sexton v. Commonwealth. December 18, 1884. Knox Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. John H. Wilson, John Dishman and J. N. Brafford for appellant; P. W. Hardin for appellee.

2. Affidavit, sufficiency of—Upon the trial of appellant for murder it appeared that the killing was done near the State line between Kentucky and Tennessee. An affidavit for a continuance on account of the absence of a witness alleged that the absent witness knew the location of the line, and would testify that "the killing was done in Tennessee."

Held—That the affidavit was defective in that it did not state the facts to which the witness was expected to testify, but stated merely his opinion as to what would constitute killing within the jurisdiction of the court, as from anything that appears in the affidavit the accused may have been within the territorial limits of Tennessee and the deceased in Kentucky at the time of the shooting, which would give jurisdiction to the courts of Kentucky. Duncan v. Commonwealth. December 18, 1884. Whitley Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. C. W. Lester for appellant; P. W. Hardin for appellee.

Contracts—

1. A contract between a railroad company and a contractor, by which the chief engineer of the railroad is to act as arbiter between the two, is valid.
2. The company agreed to pay the contractor a certain sum for the whole work, a proportion of which sum was to be paid from time to time upon the estimate of the engineer as to the value of the work as it progressed. Held—That the estimates of the engineer were not conclusive on the contractor in making his final settlement with the company, but were a mere statement of its relative value that the company and the contractor might approximate the amount, the latter was received as the work progressed.
3. Demand—A demand by the contractor of the company being necessary, the fact that he demanded more than he was entitled to recover does not invalidate the demand.
4. Mistake—While there is a provision in the contract in this case that the information derived from the specifications and schedules shall be no protection to the contractor, and that he must assume all risks, he had the right to look to the report of the engineers as approximating the quantity and character of work, and having agreed to execute the first-class masonry, which was estimated at 100 cubic yards, for much less than it was worth, in order to lower his bid on the whole work, it having turned out that there was 2,733 cubic yards instead of 100, the mistake is so gross that equity will relieve, as the contractor may have been willing and able to execute a small quantity of that kind of work at a low rate, and yet unwilling to execute so large a quantity at the same

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rate. Cincinnati Southern Railway v. Cummings. December 6, 1884. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. on original and cross appeal. W. Lindsay, C. B. Simrall and McKee & Finnell for appellant; John W. Stevenson and O'Hara & Bryan for appellee.

Criminal Law—

Cutting in sudden heat and passion—Under an indictment for malicious cutting and stabbing, to authorize the jury to find the defendant guilty of a misdemeanor, it is only required by section 1, article 17, chapter 29, General Statutes, that the cutting or stabbing should have been done in a sudden affray, or in sudden heat and passion, and without previous malice, and it was, therefore, error in this case to require the jury to find that it was done "in sudden heat and passion, caused by considerable provocation, such as a blow or actual trespass." Omission of the words "in a sudden affray," used in the statute, and the addition of other words, not used in the statute, were both erroneous and prejudicial. Baker v. Commonwealth. December 13, 1884. Garrard Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Geo. Denny, Jr., for appellant; P. W. Hardin for appellee.

Deeds—

1. Parol evidence to explain—Parol evidence is competent to show the circumstances under which a deed was made, and thus aid in its construction.
2. How construed—A deed is to be construed most favorably to the grantee. Gross, &c. v. Houchin. December 9, 1884. Edmonson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. L. M. Hazlip for appellants.
3. Fraud—Absolute deed intended as mortgage—The court refuses to cancel the notes sued on upon the allegation that the signature of the obligor was procured by the false and fraudulent representations made to her by the obligee, without any specifications as to how they were made or of what they consisted, and without any proof whatever to sustain the allegation. Nor is the court authorized to hold that the deed to the land, for the purchase price of which the notes sued on recite that they were executed, was intended simply as a mortgage, no motive appearing for the execution of an absolute deed, if the intention was simply to secure the payment of money the grantor had borrowed. Davis & Co. v. Starks, Ex'or. September 11, 1884. Ct. of Ap., aff. Young & Trabue for appellants.

Defenses—

Equitable—Transfer to ordinary docket—In an action by a landlord upon a note executed by the tenant for rent the surety in the note pleaded that the landlord, by consenting that certain property upon which he held a lien for his rent might be transferred to another, had thereby released the surety.

Held—That the defense thus set up was not one exclusively cognizable at law, and that the court, therefore, properly overruled motions to

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transfer to the ordinary docket and for a jury trial. Froman v. Morrison. December 8, 1884. Hardin Cir. Ct. Opin by Richards, J., Sup. Ct., aff. Ward, P. J., dissenting.

Devise—

Construction—A testator devised to his daughter H., $10,000, "she to account out of said sum for any advancements made by me to her after she becomes twenty-one years of age." In another clause he devised the residue of his estate to his five children, including H, to be equally divided among them. By yet another clause he provided that in case his daughter H., "should die without children" the estate devised to her should be equally divided among all his then living children, and finally appointed M. "as trustee and guardian" for his daughter H., and authorized him to receive any money or estate that might be coming to H. under the will, use the same in her support and maintenance, and reinvest the surplus. H. is over twenty-one years of age, married and has one child.

Held—That she is the absolute owner of the interest devised to her, discharged of any trust. The first two clauses mentioned vested in H. an absolute estate, and the expression "should die without children" used in a subsequent clause refers to the time of the distribution of the estate, which is to be the arrival of the devisee at the age of twenty-one. The word "trustee" is used as synonymous with guardian, and does not change the character of the estate devised. Cunningham v. Wathen, &c. December 11, 1884. Hardin Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. S. H. Bush and W. Lindsay for appellant; Lewis & Fairleigh for appellees.

Dower—

Relinquishment—Where the wife of the grantor relinquishes her dower in the body of the deed and signs and acknowledges the instrument, her right to dower passes. Stone, &c. v. Stubblefield's Adm'r. December 2, 1884. Calloway Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Sims & Cook for appellants.

Drunkenness—

No excuse for murder—The fact that appellant was "mad drunk" when he did the killing for which he has been convicted of murder makes him none the less guilty; knowing the effect of whisky, he should have abstained from its use. Finley v. Commonwealth. December 4, 1884. Floyd Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. F. A. Hopkins for appellant; P. W. Hardin for appellee.

Equity—

Accounts—The fact that accounts sued upon are confused or complicated will not authorize a court of equity to take jurisdiction and try the case as a proceeding in equity. Cincinnati Southern Railway v. Cummings. December 6, 1884. Opin. by Pryor, J., Ct. Ap., aff.

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Evidence—See Deeds, 1—

Res gestæ—The statements of an agent, purely historical, are not admissible as evidence against the principal.

In this action by appellee to recover damages for injuries done to his house, in his absence from home, by an explosion of gas alleged to have been let into his cellar by the negligence of appellant, it is alleged that statements made to appellee by his wife upon his return ten or twelve days after the accident were not a part of the res gestæ, and the court properly refused to allow appellant to prove them. Louisville Gas Co. v. Gutenkuntz. December 8, 1884. Jefferson Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. Goodloe & Roberts for appellant; Brown & Davie and Kinney & Baker for appellee.

Forcible Entry and Detainer—

1. Where one trespasser succeeds another in the possession of land the person who was actually in possession of the land when the first trespasser took possession may maintain his writ of forcible entry against the second trespasser equally as against the first if he sues it out within the time allowed by law for its issual. Alexander v. Fowler. December 2, 1884. Carter Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. J. R. Botts for appellant; A. Duvall for appellee.
2. Forcible detainer—The party proceeded against under a warrant of forcible detainer must be guilty of the forcible detainer when the warrant is sued out, as well as when the trial takes place.
3. Notice to quit—Under a tenancy from month to month, the term beginning on the first day of the month, the tenant is not guilty of a forcible detainer until the first of the next month after one month from the service of notice to remove.

Under such a tenancy, where notice was served August 2d, to give possession in one month from the service of the notice, it is held that the tenant was not guilty of a forcible detainer until October 1st. David v. Hall. December 8, 1884. Kenton Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. T. F. Hallam for appellant; M. R. Lockhart for appellee.

Frauds—See Liens.

Frauds, Statute of—

1. Description of land—In order to take a contract for the sale of an interest in real estate out of the statute of frauds the writing must so far embrace the contract that it may be specifically enforced without the aid of parol testimony, and must, therefore, describe the land.

A contract whereby the owner of land granted to another the privilege of mining upon his lands for "all time to come," without describing the lands except as "my lands," can not be enforced. Judge, &c. v. Cash. December 17, 1884. Lyon Cir. Ct. Opin. by Richrads, J., Sup. Ct., rev. C. B. Seymour for appellant; Wm. Lindsay and J. J. James for appellee.

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2. A mere oral declaration as to the existence of a trust with reference to land is within the statute of frauds and can not be enforced. Barfield v. McMurtry. September 15, 1884. Opin. by Pryor, J., Ct. Ap., aff. Breckinridge & Shelby for appellant; Hunt & Darnell and Wm. Lindsay for appellee.

Garnishment—

1. Defective service—Lis pendens—Where a garnishee answers, admitting the indebtedness and identifying it, a lis pendens is created that affects liens subsequently acquired, although the service of the order of attachment upon the garnishee was defective by reason of the fact that no notice was given specifying the debt sought to be attached. Paducah Lumber Co. v. Langstaff, &c. December 18, 1884. McCracken Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Gilbert & Reed and W. Lindsay for appellant; Henry Burnett for appellees.
2. Service of process—An attachment must be executed as to a garnishee owing the debtor by delivering to him a copy of the order of attachment, with a notice indorsed specifying the debt sought to be attached, and as between an attaching creditor who has had the attachment executed upon a garnishee without such a notice indorsed, and an assignee for the benefit of creditors generally, the latter is entitled to priority.
3. Defective process—Waiver—A garnishee, by answering, can not waive a defective service of the attachment so as to affect creditors whose rights have already attached. Robinson & Co. v. Basham's Ass'ee. December 8, 1884. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. John S. Cline for appellant; A. C. Rucker for appellee.
4. Defective process—Waiver—The Code does not require that the name of the garnishee shall be inserted in the body of the order of attachment, and, therefore, if it appears that the agent of the corporation sought to be garnished, upon whom the order could be properly served for the corporation was actually served, and that he understood it as a service for the corporation and appeared in the action, failed to object and answered for the corporation, any and all apparent defects of service are thereby waived, and his answer will be treated as the act of the corporation, if indeed it is such. Fire Association of Philadelphia v. Dickey, &c. December 17, 1884. Barren Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Temple Bodley and C. S. Grubbs for appellant; W. L. Porter and W. P. D. Bush for appellees.

Guardian and Ward—

1. Domicil of child—The domicil of the father is the domicil of his child, and domicil includes legal residence, though the actual residence be elsewhere.
2. Jurisdiction to appoint guardian—The word "resides," as used in the statute which provides that "the court of the county in which the minor resides at the time of the appointment shall have the jurisdiction to ap-

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point the guardian, must be construed as meaning the legal, as contradistinguished from actual, residence. Shirley v. Burch. December 10, 1884. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. W. Lewis for appellant; W. E. Russell for appellee.

3. Expenditure of principal of ward's estate—The guardian may go upon the principal of the ward's personal estate where it is necessary to do so in order to maintain and educate the ward in a manner suited to the ward's present condition and prospects in life. This rule, which allows expenditures by the guardian commensurate with the ward's social position, is not confined merely to the expenditure of the ward's income. James v. Buchanan. December 17, 1884. Lincoln Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Bowden, J., dissenting. Hill & Alcorn for appellant; Welch & Saufley for appellee.

4. Settlement with ward—A guardian at the expiration of his trust has the right to surrender to his ward, on settlement, goods and solvent notes taken to him as guardian, and to receive credit therefor.

The guardian in this case surrendered to the ward in settlement a note executed to him as guardian, amply secured by lien upon real estate. The ward by mismanagement allowed the property to be sacrificed, and thus failed to realize the full amount of the note.

Held—That he can not go upon the guardian for the deficiency. Owens v. Anderson. December 17, 1884. Mason Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. E. L. Worthington and J. G. Hickman for appellant; Wadsworth & Sons and A. M. J. Cochran for appellee.

Homestead—See Practice in Civil Cases, 6.

Insurance—

1. Failure to pay premium—Forfeiture—A policy of life insurance provided that if the insured should make default after paying up three years' premiums he should be entitled to a paid-up policy. He paid five semi-annual premiums, but defaulted on the sixth, for which the company accepted his four months' note, stipulating, however, that if it was not paid at maturity the policy should cease and determine. The company also gave a formal receipt for the note reciting the above stipulation. The note was not paid and the policy was thereupon cancelled by the corporation. Held—That upon the failure of insured to pay the note he could claim to have paid only five semi annual—less than three annual—payments, and, therefore, the forfeiture which had been postponed by the company's accepting the note took effect. Southern Mut. Life Ins. Co. v. Graham. December 17, 1884. Marion Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Rountree & Lisle and J. B. Temple for appellant; Samuel Avritt for appellee.

2. Paid-up policy—The Court of Appeals upon a former appeal settled the law of this case, to the effect that in order to maintain their action for a paid-up policy it was necessary for the plaintiffs to allege a surrender of

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the old policy. Southern Mutual Life Insurance Co v. Hancock, &c. December 1, 1884.

3. Conclusiveness of judgment—Ownership of goods—A having purchased a lot of goods, had them insured and transferred the policy to B. The vendor of the goods sued for the price and alleged that B. was the real purchaser and had put A (who was an infant) forward to escape responsibility; and prayed personal judgment against B, and that the proceeds of the policy be subjected (the goods having been previously destroyed by fire), B made defense, but judgment was rendered against him, and the commissioner ordered to take proof of loss on the policy. Held—In the action by the commissioner against the company this judgment was conclusive as to the ownership of the goods, and that question could not be again re-opened for the purpose of showing that the goods in fact belonged to A. Fire Association of Philadelphia v. Dickey, &c. December 17, 1884. Barren Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Temple Bodley and C. S. Grubbs for appellant; W. L. Porter and W. P. D. Bush for appellees.

Judgments—

1. When not void—A judgment will not be held void for uncertainty if by a reference to the record its intended signification is made apparent.
2. Interest—Where interest is not mentioned in a judgment it runs from the date of the judgment, and this will not be prevented except by words of clear prohibition. The words "no interest to be collected thereon" used in a judgment do not necessarily mean any more than that no interest is awarded on account of the past. Stuart, &c. v. Troutman's Adm'r. December 8, 1884. Lou. Ch. Ct. Opin. by Bowden, J., Sup. Ct., rev. A. E. Willson for appellant; W. O. Harris for appellee.

Landlord and Tenant—

Where there is a contract whereby property is rented for one year only, coupled with the further agreement that at the expiration of that year the landlord and tenant shall regard a new renting for another year as agreed on unless there is a previous dissent, a permitted holding over by the tenant is an assent of both parties to the contract for the first year as the contract for the second year, and should bind both as firmly as if there had been a formal contract entered into for the second year. Unger v. Bamberger. December 1, 1884. Jeff. Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., rev. E. McPherson and Goodloe & Roberts for appellant; M. A. & D. A. Sachs for appellee.

Liens—

Priorities—Release of mortgage procured by fraud—Where a senior mortgagee has been induced by the fraudulent representations or concealment of the mortgager to renew the debt, cancel the first mortgage and accept a second, upon the supposition that no new lien has in the meantime been created upon the property, a court of equity, in a contest be-

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tween him and a third party who has secured a mortgage during the interim, will, upon his prayer, relieve him of the consequences of his mistake by cancelling the contract under the second mortgage and restoring the parties to their rights under the first, but in the case at bar the appellee, while alleging that it was induced to take the second mortgage through mistake and the fraudulent concealments of the mortgagers, has sought and obtained a judgment enforcing it as a valid contract, and can not, therefore, claim priority over the appellant, whose lien existed prior to the date of the second mortgage. Chilton v. Farmers Ins. Co. June 16, 1884. Opin. by Richards, J., Sup. Ct., rev. Carroll & Barbour for appellant; John D. Carroll for appellee.

Limitation—

1. Malicious prosecution—The sale of land under a decree ended the prosecution of the suit seeking to subject it, and the defendant's cause of action for the malicious prosecution of the suit then accrued, and limitation began to run from that date, regardless of the failure of the defendant to discover the fraud of the plaintiff which constituted the wrong. Section 6 of article 3, chapter 17, General Statutes, in reference to actions for relief from fraud or mistake, does not apply to actions for malicious prosecution, which must be commenced within one year after the cause of action accrues.
2. Pleading—The statement by defendant in his answer is technically not a good plea of the statute, but it is defective only, and, therefore, the plaintiff should have required it to be made more specific, and, having failed to question its sufficiency in any way, it is now too late to raise the objection. Hutchings v. Frazer. December 13, 1884. Logan Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. W. L. Reeves and W. F. Browder for appellant; W. W. Lyles and R. Rodes for appellee.

Malice—

1. Murder and manslaughter—The instructions given must conform to the proof, and upon a trial under an indictment for murder, if there is no evidence from which a jury can legitimately infer the existence of malice, an instruction as to murder should not be given, but the fact that the accused shot and killed the deceased in sudden heat and passion does not preclude malice and reduce the offense from murder to manslaughter, even though the sudden heat and passion be the result of slight provocation; to reduce the offense the provocation must be considerable.
2. Mutual combat—Where the combat was mutual, and the accused entered into it with a deadly weapon, giving him an undue advantage, the killing is murder. Chambers v. Commonwealth. December 13, 1884. Jeff. Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Chas. S. Grubbs, Kinney & Kinney, Willoughby Rodman and Henry Clay for appellant; P. W. Hardin for appellee.

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Mandates—

1. Construction—A mandate of the Court of Appeals must be considered with reference to the opinion that preceded it.
2. Petition for rehearing—A petition for a rehearing is in the nature of a pleading, and when a rehearing has been granted, the judgment reversed and the case remanded to the lower court, the petition for a rehearing may be looked to to aid in construing the opinion and mandate.

   In this chancery case the petitioner for a rehearing in his petition expressly waived a certain assigned error, and the court in granting the rehearing and reversing the judgment having taken no notice of the assigned error thus waived, the lower court erred in modifying its judgment in that respect under a mandate remanding the case "for further proceedings not inconsistent herewith."
3. As the appeal was from an order confirming a commissioner's report of settlement, and the opinion did not announce a principle or principles upon which new settlement might be made, but pointed out a single item as erroneous, the mandate was only authority for consistent proceedings as to that one item. Shippen, &c. v. Stokes' Adm'r. December 8, 1884. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., rev. Wm. Lindsay and J. S. Pirtle for appellants; A. P. Humphrey for appellee.

Municipal Corporations—See Water Companies—

A municipal corporation is not liable to the owner of property destroyed or damaged by fire in consequence of its neglect to provide engines or fire apparatus. Pottinger, &c. v. Owensboro Water Co. December 17, 1884. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Ward, P. J., dissenting. R. W. Slack for appellants; Sweeney & Sons for appellee.

Negligence—

Measure of damages—In cases of mere negligence the jury are not the judges of the measure of damages. The law prescribes the measure, which is compensation. It was, therefore, error to instruct the jury that if they believed there was any negligence they should find for the plaintiff such damages, not exceeding the amount claimed, as they might think the plaintiff entitled to. Cincinnati Southern Railway v. Shropshire. December 1, 1884. Scott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. E. Cantrill for appellant; G. E. Prewett for appellee.

Pleading—

Act of another State legislature—The mere statement in the petition that the defendant, the Cincinnait Southern Railway, "was incorporated by an act of the Ohio legislature, dated May 4, 1869," did not make that act a part of the petition so as to bring all of its provisions before the court. The court could take judicial notice of no more of it than is recited in the act of the Kentucky legislature, approved February 18, 1872. Cincinnati Southern Railway v. Shropshire. December 1, 1884. Scott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. E. Cantrill for appellant; G. E. Prewett for appellee.

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Pleading and Practice in Criminal Cases—

Jury sole judges of facts—The death sentence in this case can not be reversed upon the ground that the evidence would have justified the jury in returning a verdict for manslaughter. The jury were the sole judges of the facts. Davis v. Commonwealth. September 6, 1884. Opin. by Hines, Ch. J., Ct. Ap., aff. E. Dudley Walker for appellant; P. W. Hardin for appellee.

Practice in Civil Cases—

1. Bill of exceptions—Where the bill of exceptions show affirmatively, or by reasonable construction, that all the instructions given and refused are not embraced therein the court can not inquire into the correctness of any of the instructions.
2. Assignment of errors—Assignments of errors can not be amended in any cases but those which are excepted by the Code.
3. Additional grounds for a new trial can not be filed after the expiration of the time within which the motion for a new trial could have been made upon such grounds. C., N. O. & T. P. R. R. Co. v. Barr. December 4, 1884. Grant Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Collins & Fenley and C. B. Simrall for appellant; G. C. Drane and W. W. Dickinson for appellee.
4. Where there has been a preparation and submission upon the merits, and the lower court has erroneously decided that it had no jurisdiction, upon appeal this court will pass upon the merits. Shirley, &c. v. Burch. December 10, 1884. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. W. Lewis for appellants; W. E. Russell for appellee.
5. Presumptions on appeal—On appeal every judgment must be presumed to be correct until the contrary is made to appear, and the appellant must show that his record rebuts this presumption. As the amended petition in this case expressly refers to the original and makes it a part of the amendment, in the absence of the original petition the court must presume that it contained every allegation necessary to support the judgment, and those allegations being uncontroverted, the judgment for the plaintiff is affirmed. Continental Ins. Co. v. Commonwealth. December 17, 1884. Henderson Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Stephen B. Parrish, Yeaman & Lockett and R. H. Cunningham for appellant; Montgomery Merritt and A. T. Dudley for appellee.
6. Homestead—It having been adjudged by the court below that appellee was entitled to $1,000, set aside as a homestead, and that judgment affirmed by an appeal to this court, the litigation terminated, and the court properly refused to allow a supplemental pleading to be filed seeking to subject the homestead by reason of the death of appellee's wife, which fact, as is now contended, deprived the appellee of his homestead. Wilcox, &c. v. Parker. September 29, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. Harrison & McGrain for appellants; C. B. Seymour for appellee.

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Purchasers—

Notice of lien—Appellant having purchased land at a decretal sale can not complain of the enforcement of a lien thereon as against him, upon the ground that he purchased without notice of the existence of the lien, as the deed filed in the case showed that there were lien notes on the land which had never been released. Branham v. Long. October 4, 1884. Clinton Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff., Lewis, J., not sitting. J. A. Brent for appellant.

Records—

Amending—Nunc pro tunc order—The judgment appealed from recites that a rule having been served on defendant requiring him to execute bond for the transfer of the case to equity, and he failing to do so, the judgment is rendered. No such order was made or rule entered. Held—The record taking an appeal could not be amended at a subsequent term and after by entering such orders, in fact nothing to amend by appearing in the records. Martin v. Martin's Adm'r. October 16, 1884. Clark Cir. Ct. Opin. by Pryor, J. Ct. Ap., rev. John B. Houston for appellant; French & Tucker and Geo. B. Nelson for appellee.

Sales—

Failure to deliver—Rescission—Under a contract for the sale of goods to be delivered in future in installments, it seems that the purchaser can not claim a rescission of the whole contract by reason of a failure to deliver one of the installments, and he certainly can not claim that right and escape liability for his failure to accept subsequent installments without giving notice to the seller of his intention to claim a rescission of the contract. Hanes v. Ky. Distillery Co. December 10, 1884. Jefferson Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. Burnett & Burnett for appellant; Brown & Davie for appellee.

Street Improvements—

In an action to subject property to the payment of a claim for street improvements the petition must allege the publication of the ordinance providing for the improvement, and an offer to prove the fact without such an averment will not avail. Preston, &c. v. Stengel; Weber & Schillinger v. Same; Barr v. Same. October 14, 1884. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. Barret & Brown and Bijur & Davie and John W. Barr for appellants; Harrison & McGrain for appellee.

Sureties—

Contribution—In an action by a surety against his co-surety for contribution, the principal having reimbursed the plaintiff in part, it was error to render judgment for only one-half the amount paid by the plaintiff, credited by the amount paid by the principal. The amount paid by the principal should have been deducted from the amount paid by the plaintiff, and judgment rendered for one-half the remainder. Buckler v.

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Rogers, &c. December 10, 1884. Robertson Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Winfield Buckler for appellant; W. P. Ross for appellees.

Trusts—

Resulting—The statute which provides that "when a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter" was intended to be restricted in its operation to the parties to the transaction, and was not intended to affect the right of creditors of the party paying the consideration to subject the property. Matthews v. Albritten. December 2, 1884. Graves Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. D. G. Park for appellant; W. W. Robertson for appellee.

Vendor and Vendee—

A vendor can refer to a deed of record to supplement his description of the property, but he can not require his vendee to hunt up a third party to ascertain the location of his land.

The fact that a contract for the sale of land was not reduced to writing is not of itself sufficient to entitle the vendee to recover the consideration already paid, provided the vendor is ready and willing to convey according to the terms of his contract, but where no time is fixed by the contract in which the conveyance is to be made, the law will presume it was to be done at once, and a failure to convey presently will be regarded, until the contrary appears, as a refusal to comply on the part of the vendor, and an action may be maintained by the vendee to recover what he has paid; but the vendor in this case rebuts the presumption of a refusal by alleging that she has, at all times, been willing to convey, and tenders a deed, so the sufficiency of her defense must be tested by the validity of the offer of compliance she makes. Malone, &c. v. Bank of Adairville. December 17, 1884. Todd Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. H. G. Petrie for appellants; Browder & Eubank and J. W. Rodman for appellee.

Water Companies—

1. Failure to supply water to extinguish fire—A water company, for its gross negligence in failing to supply water to extinguish fire, in compliance with its contract with a city, is not liable to the city or to the individual property holder for loss resulting to the property of the individual which it is alleged could have been prevented by the necessary supply of water.
2. Liability under city ordinance—A city ordinance which provided that it shall "be the measure of the rights and liabilites of the city and water company," and that if the company willfully neglected to supply water to the fire department, the city should not be liable for the rent of hydrants and fountains during the time of such neglect, excludes all liability of the company for damages from fires occurring while the water supply was insufficient.

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HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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IS THE STATUTE OF FRAUDS IN FORCE IN KENTUCKY?

The second section of our statute of frauds provides that no action shall be brought upon a promise to answer for the debt of another unless such promise be in writing.

There have been eighteen cases in the Court of Appeals in which, in actions on verbal promises, this section of the statute has been set up as a defense, but the court has, notwithstanding, enforced the verbal promise in all of these cases except four; thus establishing so many exceptions to the statute that it may well be asked whether it is any longer practically in force in this State.

These exceptions may be divided into five classes, as follows:

1st. Where a promise is made, not to the creditor, but to the debtor, to pay the latter's debt to the creditor, the promise is binding, though not made in writing. As where A verbally promised B that he would pay a note which B owed C, Held—A's promise was binding on him because made to B, the debtor, instead of C, the creditor, and that the right to sue on and enforce it belonged either to B or to C, though it was admitted that C could not have enforced the promise if it had been made directly to him instead of to B, it not being in writing. This looks very like an evasion of the statute, as it allows C to ac-

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complish indirectly what he could not do directly—compel A to answer on a verbal promise for B's debt. (Spadone v. Reed, 7 Bush, 457; North v. Robinson, 1 Duv., 78; Williams v. Rogers, 14 Bush, 776.)

2d. Where one induces another to become surety for a third party by verbally promising to indemnify him, the promise, though verbal, is enforceable; thus W signed a note as surety upon the promise of A "to pay the note if the principal did not." The principal failed and W had the note to pay; he then set up A's promise to indemnify him, which the court enforced, though it was not in writing. It is very difficult to understand why this promise was binding. It is certain that the principal on the note was liable to W for the amount paid by him. A's promise then to indemnify W—to repay him what he might have to pay on the note—was plainly a promise to answer for the principal's debt. (Dunn v. West, 5 Ben Monroe, 495; Lucas v. Chamberlain, 2 Ben Monroe, 277.)

3d. Where one receives some new and distinct consideration peculiar to himself, and thereupon promises to assume a debt due by another to a third person, the promise is binding, though not in writing. Thus where A buys land of B, and verbally promises to assume and pay outstanding notes due on the land by a previous vendee; here the promise of A is said to be an original undertaking for a new consideration. This may or may not be so; but it does seem reasonably certain that when A agreed to pay a note on which a previous vendee was liable, he bound himself to answer for the debt of another, and should not have been answerable on such a promise unless made in writing. (Creel v. Bell, 2 J. J. Marshall, 311; Jennings v. Crider, 2 Bush, 325; Hodgkins v. Jackson, 1 Bush, 543.)

4th. A promise, though not in writing, to answer for the debt of another is enforced when it is made in consideration of the release of the other from all liability. Thus where A promised B to pay him the amount due on C's bond if B would deliver up the bond to C, held that the statute did not require such a promise to be in writing, as the bond was extinguished

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by its delivery to C, the obligor, who was thereby released from all liability on it, and A, therefore, could not be said to be liable for another's debt since no other than himself was any longer bound. (Armstrong v. Flora, 3 Monroe, 44; Day v. Cloe, 4 Bush, 564; Haydon v. Christopher, 1 J. J. Marshall, 383.)

5th. Where one promises another to pay for goods which the latter is to sell and deliver to a third party, and the goods are charged to the party promising and not to the third party, the former must pay, though his promise was verbal only. As where M, having ordered 80 kegs of beer of O, who having refused to deliver it on M's credit, and A thereupon agreed to pay for it, and it was charged to him and delivered, the court held A liable on his verbal promise, though it appeared that O had demanded payment of M and had taken out an attachment against him. If the goods had been regarded as sold on A's credit alone and no claim made against M, there might have been ground for holding A on his promise, but M being liable also, the case is a palpable evasion or disregard of the statute. (Leisman v. Otto, 1 Bush, 227; Stapp v. Anderson, 1 Mar., 539; Porter v. Langhorn, 2 Bibb, 63.)

These numerous exceptions to the operation of the statute show either that it is not drawn in apt words, its terms embracing cases not intended to be affected by it, in which case it should be redrawn; or that the courts have found from experience that justice is not so well promoted by adhering to a rigid rule requiring written evidence of all promises to answer for another's debt, as by enforcing the promise whenever it appears from all the evidence in the case actually to have been made—if this be so the statute should be repealed.

COURT OF APPEALS OF KENTUCKY.

WALKER, &c. v. SMITH, &c.

(Filed January 20, 1885.)

1. Witness—Fraudulent deed—Vendor—Vendor is a competent witness for either party in an action by the creditor against the vendee to set aside a conveyance as fraudulent.

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2. Contradicting witness—Where a witness, failing to testify in favor of the party calling him (without testifying to that party's prejudice), is asked whether he did or did not make certain statements to other persons, and on his answering that he did not, those persons can not be called to contradict him.

3. Fraudulent conveyance—Proof of fraud—Fraud is not to be lightly inferred. This deed is upheld, four unimpeached witnesses proving that the vendee paid an adequate consideration for the land as against a mere suspicion of fraud on the other side.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Hines.

In 1870 Hicks made a deed to Norment for a tract of land and certain personal property for the recited consideration of $8,000. Subsequent to the conveyance appellees obtained a judgment against Hicks, had execution issued, levied upon this land and had it sold under the levy, appellees being the purchasers. Appellees, having no deed from the sheriff, brought suit in equity against Hicks and Norment (Hicks being in possession as the tenant of Norment) to recover possession of the land, to have their title quieted, and the deed from Hicks to Norment canceled, alleging that the conveyance was void because without consideration, and that it was made to cheat, hinder and delay the creditors of Hicks.

The court below adjudged that appellees were the owners of the land by their execution purchase, and directed the deed from Hicks to Norment to be canceled.

The case is anomalous in that it presents no ground of equitable jurisdiction. It is well established in this State that a court of equity will not entertain jurisdiction to set aside a conveyance alleged to be fraudulent and subject the land to the satisfaction of a legal demand unless there is an allegation of judgment at law, an execution and return to nulla bona, or by attachment under some of the grounds stated in the Code. It is also well understood that in order to give jurisdiction to a court of equity to quiet title the complainant must allege in himself both possession and the legal title. Notwithstanding this the case proceeded, without objection by demurrer or otherwise to the jurisdiction, to a final termination. Under

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this state of fact, as we have held in the case of Barton v. Barton, 80 Ky., 218; 3 Ky. Law Rep., 746, it is now too late to raise the question of jurisdiction. In that case this court said: "This is unlike a case where the court has no jurisdiction of the subject-matter, for in such case no consent can give jurisdiction; but here the court had jurisdiction to adjudge whether a conveyance or transfer of property was fraudulent, provided certain steps had been taken, and a failure to raise the question as to whether such steps had been taken is akin to submission of the person to the jurisdiction, where there has been no service of process, which may, in all cases, be done when the subject-matter may otherwise be inquired of by the court."

Appellant's objection to the reading of the certified copies of the judgment, execution and return, which, although not filed with the original petition, were filed before the pleadings were completed, is not well taken. In such case a denial of sufficient knowledge or information to form a belief will not present an issue. The attack must be made directly upon the certified record (12 Bush, 292, 336 and 598). It is prima facie evidence of the facts it is invoked to establish.

The objection of counsel to the introduction of certain other evidence is well taken. Appellees called Hicks, the vendor, as a witness, and, among other things, asked him if he had not stated to various persons, naming them, that the land trade between himself and Norment was a sham—if he did not say that the money which was pretended to have passed from Norment to himself in payment for the land was Confederate money. To all of these inquiries the witness stated that he made no such representations and had no such conversations as inquired of. Appellees then introduced, over the objection of appellant, the several persons in reference to whom Hicks had been inquired of, and they severally stated that Hicks had stated to them, not in the presence of Norment, that the pretended trade was a sham. This evidence was clearly incompetent.

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Before the adoption of the Code a party surprised by the testimony of his own witness was allowed to contradict him only by proving that the fact stated in evidence was different. Under the Code there is this additional method of conviction: When the witness testifies to a fact that is prejudicial to the party calling him, the party may prove by others that the witness had stated the fact to be otherwise.. But where the witness does not state a fact prejudicial, but simply fails to prove facts supposed to be beneficial to the party, he can not be contradicted as attempted in this case. (Champ v. Commonwealth, 2 Met., 18; Kennedy v. Commonwealth, 14 Bush, 340; Loving v. Commonwealth, 80 Ky.; 4 Ky. Law Rep., 457.)

It is also contended for appellant that Hicks was not a competent witness for any purpose, for that would be to allow him to question and invalidate his own conveyance. This was the rule before the adoption of our law of evidence removing disqualification on account of interest. Under the old rule the vendor could be called, in a proceeding to set aside a conveyance for fraud, to sustain the conveyance, but not to impeach it. That was on the supposition that the evidence for the vendee was against the interest of the witness. The vendor is now competent, but his interest, if any, may be shown to affect his credibility only.

The testimony of the witnesses called to contradict or impeach Hicks being excluded, we will inquire what evidence there is bearing upon the question of no consideration. Hicks testifies, being called by appellees, that Norment (who was dead at the trial) paid him $8,000 in current funds for the land and personal property as recited in the deed. Two other witnesses testify that they witnessed the execution of the deed in the country, and saw the money given by Norment to Hicks, the amount of which they did not know as it was not counted in their presence. One of the witnesses states that to an inquiry from him Hicks stated at the time that he did not care to count the money as he and Norment had counted it, and he

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knew the amount. One of these witnesses states that he was called to witnesss the payment of the money, and the other that he was called to witness the deed, but they both signed the deed as witnesses. Another witness, the daughter of Norment, testifies that she passed through the hall at the time the deed was being executed and saw a large quantity of greenbacks on the table, and that in response to an inquiry from her Norment said he had bought Hicks' place. Hicks also says that the reason he sold his farm and personal property was that he had lately lost his wife and had determined to go to Texas or California. To establish that there was no consideration for the conveyance—it is shown that the conveyance covered all the property owned by Hicks—that he was shortly thereafter known to be insolvent; that Norment was only in moderate circumstances, owning some five hundred acres of land, considerable personal property, and but little cash on hand so far as could be shown by his bank accounts. It is also shown that Hicks for several of the years since the conveyance to his brother-in-law Norment has remained upon the place, paying no rent except in the crops he raised. Hicks says he lost about $4,000 of the money paid him in a farming venture in an adjoining county, but that he has expended the other $4,000 without knowing how. The evidence shows that he has been for years dissipated and has expended large sums of money, probably $40,000, in that way within the last few years.

This is substantially all the evidence bearing upon the question of fraud and no consideration. Is it sufficient to authorize a court of equity to find the transaction fraudulent? We think not. The existence of fraud is not to be lightly inferred, but must be proved. We have four unimpeached witnesses testifying to the payment of the money and the good faith of the transaction, and opposing it are the circumstances mentioned. With the incompetent testimony in the record the judgment of the court below would be well supported, but that

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evidence being elimated there remains nothing but a suspicion of fraud on which to base a finding.

Judgment reversed, with directions to dismiss the petition.

Wm. Lindsay and H. F. Turner for appellants.

Vance & Merritt for appellees.

ZABLE, &c. v. HARRIS.

(Filed January 10, 1885.)

1. Appeal from Superior Court—Jurisdiction—Where the amount in controversy is less than $1,000, excluding interest and costs, no appeal lies from the judgment of the Superior Court reversing a judgment of the lower court unless there is a certificate of two judges (of Superior Court) stating, in substance, that the question involved is novel and important.

2. Amount in controversy—Where distinct judgments, each for less than $1,000, are rendered against different individuals, the Court of Appeals has no jurisdiction, though the judgments were all in the same action and involve the same questions.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This appeal is prosecuted from a judgment of the Superior Court reversing a judgment of the Louisville Chancery Court in favor of the plaintiffs against the defendants for the amount due by each for certain street improvements made in the city of Louisville, and a lien enforced for the payment on certain real estate. Each judgment is entirely separate and distinct from the other and for less than $1,000, the one judgment debtor in no manner liable for the judgment against the other.

A motion is now made by the defendants below, who were appellants in the Superior Court, to dismiss the appeal in this court or remand it to the Superior Court upon the ground that this court has no jurisdiction of the appeal.

By subsection 1 of section 5 of the act establishing the Superior Court this court has no jurisdiction of an appeal from the Superior Court "where the amount of the fine or the value in controversy is less than $1,000, exclusive of interest and

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costs," and by subsection 2 this court has no appellate jurisdiction "where the judgment of the lower court has been affirmed by the Superior Court without a dissenting vote," although the amount involved may exceed $1,000. It is, however, expressly provided in subsection 2 that in every case coming within either of the exceptions, any two of the judges of the Superior Court shall certify that in their opinion the question involved is novel, and is one of sufficient importance, the party against whom the decision was rendered shall be entitled to take the same by appeal to the Court of Appeals as in other cases. While it is not necessary that the certificate by the two judges of the Superior Court should contain the exact language of the act, the jurisdiction of this court, where the appeal is attempted to be prosecuted within either of the exceptions, is made to be defined upon the statement or certificate of two of the judges in substantial compliance with the provisions of subsection 2, authorizing such an appeal. Where the judgment of the lower court has been reversed by the Superior Court, or where there is a dissenting opinion or vote, if the judgment exceeds $1,000, exclusive of interest and costs, the appeal comes to this court as a matter of right, but in all cases where the amount in controversy is less than $1,000, or where the judgment of the lower court has been affirmed without any dissent, the certificate of two of the judges, as provided in subsection 2, is indispensable to the jurisdiction in this court. In this case it is argued that the appeal is a unit, but the judgment in favor of the one has no connection with the judgment in favor of the other. The legal questions involved may be identical, but the judgments are entirely distinct.

If this court should entertain jurisdiction in this class of cases the docket would soon be filled with appeals that did not involve novel and important questions, and thereby defeat the very object of the section bearing on this question.

The objection to the notice of the intended motion, either as to form or substance, can not affect the question of jurisdic-

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tion, as the court could decline to entertain the appeal if no motion had been made. The entire case is remanded to the Superior Court for want of jurisdiction in this court.

S. B. Richardson for appellant.

Barnett, Noble & Barnett, Wm. Lindsay and Jas. Harrison for appellees.

LOUISVILLE GAS CO. v. GUTENKUNTZ, &c.

(Filed December 18, 1884.)

Gas Co.—Exploding gas—Remote and proximate cause of injury—Contributory negligence—An agent of the company came to G.'s house and shut off the gas by inserting a key in the pipe and turning it in a particular way, but in removing the key he unintentionally and unknown to himself turned on the gas again, which escaped into the cellar, he having taken out the meter from the cellar, and on G.'s wife going down there with a lighted candle the gas exploded, horribly burning and injuring her. Held—The company is liable, the act of its agent being the immediate and not the remote cause of the injury. And that the wife was not guilty of contributory negligence in entering the cellar with a lighted candle, though she smelt the escaping gas before going in.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The appellants, Gutenkuntz and wife, obtained a judgment in the Jefferson Court of Common Pleas against the Louisville Gas Co. for the sum of $5,000 for an injury to the wife caused by an explosion of gas, resulting from the negligence of the agent of the company; that judgment is the subject of revision in this court.

The appellees were the owners of a house in which they resided on Market street in the city of Louisville, and had been using the gas of the company for several years, having gas pipes leading through most, if not all, the rooms of the dwelling.

In December, 1881, they desired to stop the use of gas, and directed the company to shut it off from the house. The gas passed from the main pipe on the street, through what is called the service pipe, into the meter placed in a cellar of the

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dwelling, and thence by means of pipes to the various rooms of the house.

The gas is closed off by means of a long key, several feet long, inserted in a box attached to the service pipe, and so arranged that in turning the key it stops the flow of gas entirely and removes all danger of an explosion.

An employe of the company came to the house in December, 1881, about 3 o'clock in the evening, and, as he says, by means of the key, turned off the gas, and then proceeded with a lighted candle to the cellar, found that the gas had ceased to flow, unscrewed the connecting pipes from the meter, taking the meter out of the cellar and placing it in his wagon. He then left, going to some other part of the city, and, finding that he had left the key in the box on the street when he turned the gas off, returned in about ten minutes, took the key out, and carried it with him.

The agent states that he is confident the flow of gas into the cellar was entirely stopped by him, and equally as confident that he did not turn the gas on when taking the key out, and from his theory of this case, as well as that relied on by the appellant, some one, during this period of ten minutes, had been tampering with the key and let the gas on.

A small boy, the son of the injured woman, says that he accompanied the employe of the appellant into the cellar; that he had no candle, and while there, smelling the gas strongly, he made some remark about it, when the employe of the company replied that it was gas escaping from the pipes that led through the house, and was the natural result when removing the meter. This conversation the employe of the company denies, and says that he had a lighted candle and applied it to see if the flow of gas had been checked.

At 7 o'clock of the same evening, or perhaps later, the appellee, Mrs. Gutenkuntz, finding the smell of gas in her room exceedingly unpleasant, and thinking, as she says, that it was the gas that had escaped from the pipes into the cellar after the meter had been removed, took a lighted candle to the

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cellar door with a view of opening the door and ventilating the cellar, which being filled with gas, an explosion took place that lifted her from the ground, throwing her into the cellar, and burning her face, neck and arms in a horrible manner. She suffered for weeks with the skin and flesh sloughing off her arms, and finally recovered, the weight of the testimony conducing perhaps to show that she is not permanently injured, except the appearance of a cicatrice on her arm that produces much pain, and from the testimony of her attending physician will follow her to her grave.

There is no evidence in the case conducing to show that any member of appellees' family or any one in their employ had tampered with this key so negligently left by its employe in the box on the street, but counsel for the company, assuming that the testimony of Jones as to his stopping the flow of gas is true, also assumes that some responsible person during the interval of ten minutes, the period intervening between Jones' departure from the house and his return after the key, had turned on the gas causing the injury to the plaintiff, and, therefore, no recovery can be had against the company, but the remedy is against this phantom, appearing on the ground and using this key in Jones' absence.

There is no testimony that any one, responsible or irresponsible, touched the key after it had been placed in the box by Jones, and the presumption only can be indulged that some one else than Jones must have handled this key in his absence, if his testimony is to be believed.

On this theory of the case counsel for the company asked the court to give this instruction: "If the jury believe from the evidence that the defendant turned the gas off from plaintiff's house and cellar, and that afterwards it was turned on by some one not under the control of the defendant, and without the knowledge or consent of the defendant, and that plaintiff, Magdalena, caused the liberated gas to explode by placing a lighted candle in contact therewith, and the injury complained

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of was caused by such explosion, they must find for the defendant."

This instruction the court refused to give, and we think properly.

It is conceded on the part of counsel for the company that its agent was guilty of negligence in leaving the key in the box, but that such negligence ought not to make the appellant liable for all injuries that might result from this act of its agent unless it was the proximate cause of the injury. The fifth instruction given by the court at the instance of the plaintiff tells the jury "that although the flow of gas may have been caused by some other person, still it did not relieve the defendant from the negligence of its employe." We understand from this instruction that it included an intelligent and responsible agency meddling with this key after the employe of the company had left it, and notwithstanding the responsibility of the intervening agency the company is also responsible.

The general rule cited by counsel for appellant is: "Whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, even though those consequences be brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoers, or provided those acts causing the damages were the necessary or legal and natural consequences of the original wrongful act." (Saunders on Negligence.)

It is endeavored to be maintained that under this rule the negligent act of the company's agent was not the proximate cause of the injury, and that the accident was neither the necessary or natural consequence of the negligent conduct of the agent.

This question is propounded to the court in the brief of counsel in illustration of the position assumed in this case: "Suppose some one passing on the street had pulled the key out of the box and struck a bystander with it, thereby inflicting a severe wound, would the gas company have to respond in

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damages because its agent had committed an act of negligence in leaving the key on the sidewalk? Why not? If the key had not been carelessly left by its agent the party injured would not have been wounded with it."

There is no analogy between the supposed case and the one under consideration. Here it was the duty of the company through its agent to remove the meter from the cellar of the plaintiff, and in doing so to exercise such care as one of ordinary prudence and judgment in the discharge of such a duty would be required to exercise for the safety of the dwelling and the family from this explosive substance. This duty he partially performed, but left the key in the box on a street of the city, exposed to the handling of those in passing by, whether from motives of curiosity or from a design to injure others, when the movement of the key in the one direction or the other would start the flow of gas into plaintiffs' cellar. The handling of the key by others when left in such an exposed condition was the ordinary and natural result of the negligent act, and that fact any man of ordinary judgment should have foreseen.

While the agent might have left the key on the sidewalk or in the box, it could hardly be supposed or even anticipated that it would be used as a weapon in inflicting bodily injury upon those passing, but he ought to have known and anticipated the danger that would result from leaving the key in the box when the slightest movement of it would have turned the gas on. The negligent or willful act of the stranger in striking a bystander was not such a result as the agent of the company had the right to anticipate, "but an intervening act of an independent voluntary agent does not relieve the party doing the first wrong from the consequences of his wrong, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer." (Thompson on Negligence, note 6, page 1089.)

Various illustrations of this rule are given in the elementary books on the subject as well as in reported cases. If the agent

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had lost the key from his wagon or even left it on the sidewalk of the street, and it had been picked up by a passerby, who had taken it to this box on the street and let on the gas, it would not have been such negligence as would have made the company responsible. The key in itself was harmless, and there would have been no reason to expect that it would have been taken and used for such a wicked purpose.

But every one should be held responsible for his unlawful acts or their consequences when by the exercise of an ordinary judgment he could have foreseen the danger. Here the key was not only left on the public street, but in a position in the box where handling it at all made the danger inevitable.

It was negligence of the grossest character, and the result could have been looked for by any reasonable being. This branch of the case is discussed on the idea that some one else than the agent tampered with the key, when there is no evidence to support it, and when it is apparent that the agent, in withdrawing the key in his haste to return, turned the gas on. There is no escape from this conclusion, and it is the only reasonable solution of the issue of fact in this case. He doubtless turned the gas off before going into the cellar and tested that fact by applying his candle to the pipe, and when leaving felt that he had discharged his duty.

He was gone only ten minutes when he returned, took the key from its place in the box, and soon the cellar was filled with gas; still it is insisted that the jury had the right to find that some responsible intervening agent, unknown to them, committed this wrong, and for that reason the company is not responsible. The recovery in this case was permitted for the reason that the agent of the defendant undertook, at plaintiff's instance, to shut off the gas from the house of the plaintiff, and in so doing left the gas pipes in such a condition as to cause the gas to continue to flow and fill plaintiff's cellar, resulting in the injury complained of. The instructions are given on this theory, and whether the agent of the company

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turned the gas on or some one else is immaterial; the instructions were proper and embraced the law of the case.

It is insisted that instruction No. 3 for the plaintiff is improper because the word recklessly is used. The court told the jury that if the plaintiff, knowing the dangerous and explosive character of gas, and that the cellar was filled therewith, recklessly proceeded to enter the same with a lighted candle, and thereby caused the explosion, the defendant is not liable. This instruction was at best abstract and without any evidence to sustain it, except the mere fact that on smelling the gas the appellee went to the cellar with a view of ventilating it, supposing that the gas was escaping from the pipes in the house.

Besides, the court in giving instruction No. 7 for the defendant said to the jury: "If from the evidence they believe that the plaintiff, Magdalena, could, by the exercise of reasonable and ordinary care, that is, by the exercise of that care and prudence which a person of ordinary prudence would have reasonably exercised under such circumstances, have avoided the effects of defendant's negligence, their verdict should be for the defendant." This instruction must have removed any doubt on the minds of the jury as to what constituted contributory neglect, and when there is no proof to sustain either the instruction given for the plaintiff or that for the defendant on this branch of the case, no harm could have resulted in giving them, even if objectionable. We have read the testimony carefully, as we find it embodied in the record, and the only question really presented is as to the quantum of damages. There is no defense presented; no testimony that any one else than the defendant's agent caused the injury, and no proof of contributory neglect.

The testimony authorized the verdict for the plaintiff, and that the damages are excessive is neither argued as an error in this court or as a ground for a new trial in the court below, but, giving to the defense the full benefit of this alleged error, when looking to the testimony we are not prepared to say that the damages are excessive. There is proof conducing to show

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injuries of a permanent character to the appellee, and by reason of such negligence on the part of its agent as was inexcusable.

Judgment affirmed.

Goodloe & Roberts and W. Lindsay for appellant.

Brown & Davie, A. Baker and W. R. Kinney for appellees.

PORCHET'S ADM'R v. SCHERZER.

(Filed January 15, 1885.)

Bastard—Distribution — A woman, having had a bastard child, subsequently married and died, leaving her husband surviving her. Held—As he was entitled to her personal estate absolutely, even as against her legitimate child, he took it also as against her bastard, and might dispose of it by will to the entire exclusion of the bastard.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Hines.

Appellee, born in Germany and now residing there, is the illegitimate son of Margarite Scherzer, who subsequently came to this country and married John L. Porchet, the reputed father of appellee. Porchet and wife by joint exertion accumulated considerable estate, $2,700 of which they loaned on mortgage, taking notes payable to Mrs. Porchet. Mrs. Porchet died, leaving no children by the marriage, administration was had, the mortgage lien enforced by sale of the property for the amount of the debt, and John L. Porchet became the purchaser. Porchet again married, executed a will giving all his property to his wife and died, his wife surviving. Appellee brought this action claiming as heir of his mother the $2,700 referred to. The court below adjudged that appellee was entitled, as the heir of his mother, to the sum sued for, and from that judgment this appeal is taken.

The court below appears to have based the judgment upon sections 4 and 5 of chapter 31, General Statutes. The fourth section provides that: "In making title by descent, it shall be

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no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or has been an alien."

Section 5 is: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

This court has construed the fifth section to apply to inheritance in a direct line ascending and descending, but as not applying to descent and distribution in collateral branches.

As applicable to the question presented here it is manifest that the section applies if there is any property to which it can attach, but, as we conceive, there is no such property. We understand that the statute, which is a departure from the common law, was intended, under the limitation suggested as to inheritance in the direct ascending or descending line, to place the illegitimate child in the same relation to the property of the mother as if the child had been born in lawful wedlock. It was not designed to give the bastard a right of inheritance denied to a legitimate child. If the mother owned real estate or other property in her own right which would descend to a legitimate child the bastard would take in the same way, but the property sought to be recovered here is not of that character. Third subsection of section 11 of chapter 31, General Statutes, provides that "a husband shall have the whole surplus of a deceased wife's personal estate." The money sought to be recovered is personal estate and passed, in the death of Mrs. Porchet, under this statute to her husband. A legitimate child could assert no claim as against the father, and certainly it was not intended to give a better right to a bastard.

It is suggested by counsel for appellee that as this court has held, following the civil law instead of the common law, that the subsequent marriage of the parents, with recognition of the paternity of the child, removes the bar of illegitimacy, appellee is entitled by inheritance through the father. To this there

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are two answers: First, there is no evidence of recognition of the paternity of the child by the parents; and, second, if there was the will of John L. Porchet giving his property to his wife left nothing to descend to his heirs.

As to the suggestion of counsel that appellee is entitled to this specific sum of money as a gift by the parents during their lifetime, it is sufficient to say that there is no evidence to sustain a gift inter vivos.

Judgment reversed and cause remanded, with directions to dismiss the petition.

Nelson & Washington for appellant.

E. W. Hawkins for appellee.

HALL v. FORMAN, &c.

(Filed January 8, 1885.)

Attachment bond—Action on—Bar to—Where one has already recovered general damages against another for maliciously taking out an attachment, he can not afterwards sue on the attachment bond for special damages, though the surety is a party to the latter action and was not to the first.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Holt.

This action was brought against D. W. Forman and his surety, W. H. Forman, upon an attachment bond to recover the special damages embraced by it.

A previous recovery of the general damages in an action against D. W. Forman alone for the wrongful and malicious suing out of the attachment was relied upon in bar of the action.

It is admitted that the relief asked and obtained in the former action was confined to the injury arising from loss of credit, impaired reputation and injured feelings; while the petition in this case seeks to recover for the expense and loss of time in defending the attachment, attorneys' fees and costs incurred in doing so, and the loss of or injury to the attached property by its seizure and sale.

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The only question, therefore, presented by this appeal is whether the satisfied judgment for the general damages or those which resulted necessarily from the injury is a bar to another action upon the attachment bond for the special damages which naturally, but not necessarily, arose from the suing out and levy of the attachment.

While the two actions differ not only in form but as to parties, as well as the testimony necessary to establish each, and also as to the extent of the recovery, yet the entire damage is the result of the one act or wrong, and each action is pro eadem causa, or for the wrongful suing out and levy of the attachment.

In each action it is incumbent upon the plaintiff to show that the attachment was wrongfully sued out; but in that for maliciously suing it out he must go further and show that the creditor acted from malice and without probable cause.

The liability of the surety in the attachment bond is dependent upon that of the principal; and if the latter can rely upon a matter in bar so can the security.

The two actions are not commensurate as to remedy, but that for maliciously suing out the attachment comprehends the other, and in it the plaintiff has the right to recover the entire damage he may have sustained.

Although he may have the right to bring either one of two actions that differ in form and extent of remedy, yet if each is based upon the same act, and he adopts the one that comprehends the other, the public peace and quiet require that he should be satisfied.

If one trespasses upon another and in doing so carries away the latter's horse, the owner may waive the trespass and sue for the value of the horse; but if he does not do so and sues for the trespass he could not thereafter sue for and recover the value of the horse, although he may not have sought in the first action to recover for the taking of the horse.

With this brief notice of the reasons which have been urged to show that the former judgment should not be held to be a

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bar to this action we pass to the statement of those which, to our minds, lead irresistibly to the opposite conclusion.

Nemo bis vexari pro eadem causa is an old legal maxim.

If one takes another's property and sells it the latter may maintain an action for trespass, or on the case for money had and received, or replevin, or trover; but a recovery in one is a bar to another because each would be for the same act.

A recovery can not be had for the killing of one by willful neglect, and also a recovery by the personal representative for the bodily and mental suffering between the date of the injury and the person's dissolution because both grow out of the one wrongful act.

There is another rule which experience has shown to be necessary as a guard against the evil of excessive litigation. Every person must vindicate his rights in due season and in proper order; and while, in our opinion, it does not do so in this instance, yet so necessary is this rule to the general good that the law must necessarily often operate with such severity as to individuals as to deprive them of their rights.

Thus limitation may prevent the enforcement of a just claim; and a second litigation can not be permitted as to the same transaction, and especially ought not to be allowed if the first afforded an opportunity for complete justice.

The individual inconvenience or loss, if any, is preferable to endless uncertainty.

The rule to which we refer is, that the judgment of a court of competent jurisdiction is not only final as to all matters determined by it, but as to every other matter incident to the cause or properly belonging to the subject of the litigation, and which the parties might have put in issue and had determined. (Talbott v. Todd, 5 Dana, 190; LeGuen v. Gouvernuer, &c., 1 John. Cases, 436.)

This rule requires the exercise of reasonable diligence only, and is conducive to the ends of justice and the peace of society. It is based upon reason and propriety; and by all the analogies of the law it follows that when a person has adopted a form of

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remedy which is comprehensive enough to afford him complete relief, and has pursued it to the extent of a satisfied judgment, that he should not be allowed afterward to vex his adversary with an unnecessary suit.

It is true that the remedy by attachment is an extraordinary one, and that the abuse of it should not be permitted. In providing it the legislature intended to protect the defendant as well as the plaintiff.

The seizure of the property might be ruinous to the owner and wrongful, and yet be done without the least malice.

In such a case the plaintiff should at least be liable for the actual injury; and the right to an action on the bond was provided to meet such a case. It has been called "a cautionary bond."

But when an action for maliciously suing out an attachment can be maintained then, as the major includes the minor, so it embraces the injury covered by the bond; and it is a correct principle, and one necessary to the proper administration of justice, that where complete reparation can be had in a form of action that the plaintiff has seen fit to adopt, that he must obtain it in that proceeding, and not impose needless cost upon the other party, or consume the time of the court with an unnecessary action.

Any other rule would aid in producing a multiplicity of suits, which the law abhors.

The case of Petitt & Owen v. Mercer, 8 B. Mon., 51, only draws the distinction between the two actions, and defines for what the plaintiff may recover damages in an action on the bond; and does not decide, nor do we think it intimates, that a party can first recover damages in an action for maliciously suing out an attachment, and then resort to an action on the attachment bond. At most it only intimates that the adoption of the lesser remedy does not prevent the subsequent use of the greater.

Nor was the question now presented decided or even raised in the cases of Cox v. Taylor, 10 B. Mon., 21, and Johnson v.

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The Farmers' Bank, 4 Bush, 283. In the last-named case the action was upon the attachment bond, and no suit had ever been brought for maliciously suing out the attachment.

If a party chooses a form of remedy which is so ample that he may thereby obtain complete relief, then he should present his whole case; and if he does not do so he can not thereafter sue for some special damage arising out of the same act, and for the doing of which he has already recovered damages of some particular character; and the opinion of the Supreme Court of the United States, in Cromwell v. County of Sac, 94 U. S. Reps., 35, is not at war with this view of the question, but in fact confirms it, if we correctly understand it.

In the case last cited the former recovery attempted to be relied on was had upon a different cause of action from the one then being asserted.

In this instance the party elected to first sue for the malicious suing out of the attachment. He could have asserted and recovered in it damages for all his injuries of every character growing out of his adversary's wrongful act. Individual right as well as public policy required that he should do so. It was not a mere privilege given him by statute, which he might or might not exercise according to his will, as in a case of ejectment and a claim for mesne profits; and the satisfaction he thus obtained is conclusive, not only of all claims for damage which were in fact then put in issue, but of all which might have been and which resulted from what was but one wrongful act.

Judgment affirmed.

Beckner & Nelson for appellants.

Haggard & Jones for appellees.

BUTLER v. WHEELER, &c.

(Filed January 10, 1885.)

Married woman—Acknowledgment—Mortgage—A and wife executed a mortgage on her land which they duly acknowledged; but the mortgage

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was not recorded within eight months, and when at last recorded it was not re-acknowledged by the wife. B bought the land with full knowledge of this outstanding mortgage. Held—He was not bound by it, as the re-acknowledgment of the wife was essential under the Revised Statutes to the validity of the mortgage.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

The mortgage by Edwin Francis and his wife upon her land to the appellant, J. S. Butler, and which he is now seeking to enforce, was acknowledged by her on February 22, 1871, but not recorded until September 19, 1873, a period of over two and a half years.

It was never re-acknowledged by her. On February 26, 1873, she and her husband sold and conveyed the land to one Kelly, and he, on April 6, 1876, to the appellee, Wheeler.

The petition alleges that both Kelly and Wheeler had full notice when they purchased of the existence of the mortgage. This is admitted by the demurrer to be true; and the sole question is whether the delay in recording it was fatal to its validity.

If it was a nullity when they purchased, then their knowledge of it avails nothing for the appellant.

The question must be determined by the provisions of the Revised Statutes, and not by those now in force.

Section 15, chapter 24, Revised Statutes, reads thus: "Deeds made by residents of Kentucky, other than deeds of trust and mortgages, shall not be good against a purchaser for a valuable consideration not having notice thereof, or any creditor, except from the time the same shall be legally acknowledged or proved and lodged for record, unless the same be so lodged within eight months from the date thereof."

Section 23 says: "Where deeds have been or may be legally executed, but not recorded or lodged for record in proper time, such deeds may be proved or acknowledged and recorded, and be as effectual from the time of so recording as if recorded in proper time. This section shall not apply to the deed of a married woman unless re-acknowledged by her and recorded thereafter in proper time."

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Prior to the act of 1881 relating to this subject the law in force was substantially like the sections supra, and it was then held by this court that the deed of a married woman was not valid unless it was recorded or lodged for record in the proper office within eight months from the date of its acknowledgment; and if this were not done it could only be rendered obligatory by her own act. (Applegate v. Gray, 9 Dana, 215; Scarborough v. Watkins and Wife, 9 B. Mon., 540.)

The sections above quoted have received the same construction; and not only has the way been blazed, but so long followed that it would not be safe to depart from it. (McGuire v. Bowman, 6 Bush, 550; Dugan v. Corn, 6 Ky. Law Rep., 10.)

But it is urged that the same rule does not apply to a mortgage executed by a married woman because section 15, supra, expressly excepts deeds of trust and mortgages; and that the statute fixes no time within which they must be recorded. This point is not free from difficulty.

The power, however, of a married woman to make either a deed or a mortgage is derived solely from the statute (sections 20-21); and in giving it, either the term "conveyance" or "deed" is used in the statute, and not the word "mortgage," thus showing that so far as married woman were concerned the latter was intended to be comprehended in the former; otherwise it follows that she had no power to make a mortgage; and the power being thus given it must be strictly pursued.

The same form of acknowledgment and certificate was prescribed by the statute as to married women, whether the instrument was a deed or simply a mortgage.

The 22d section of said chapter provides that "a deed of a married woman to be effectual shall be acknowledged before some of the officers named in the preceding sections, and recorded in the proper office."

We conclude from a careful comparison of the different sections that wherever the word "deed" occurs in those relating

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to married women that it embraces a mortgage; and that section 15, supra, relates only to the deeds of persons sui juris, save so far as a time for recording is named; or otherwise no effect whatever can be given to the latter clause of section 23, which says: "This section shall not apply to the deed of a married woman unless re-acknowledged by her, and recorded thereafter in proper time."

The statute made a difference between the deed of a married woman and that of a person sui juris.

In the latter case it was always valid inter partes, although never recorded; but in the former this was not true under the Revised Statutes, while it is under the General Statutes, the last clause of said section 23 having been omitted from the latter.

Under the Revised Statutes the purpose of recording in the one case was to give notice of the existence of the instrument, while in the other it was necessary to its validity; and if the deed of a feme covert was not recorded in proper time it was a nullity even inter partes.

If the recording of the feme's deed was necessary to pass her right, we see no reason why it was not equally as necessary in the case of a mere mortgage. If it was needful in the one case because there had to be a privy examination, then it was equally so in the other, as the same formality of execution was requisite.

The section of the statute which fixes the eight months limit for recording uses the term "deeds" in doing so; and the sections empowering a married woman to execute a mortgage use the same term, hence the limitation in the one section must have been intended to apply to the other, and this is the more evident because section 23, supra, speaks of a "proper time" within which the deed of a married woman must be recorded, and no time whatever is fixed by the statute save said eight months.

When the entire statute relating to the subject is considered, but one conclusion can be reached; and that is, that the recording of the mortgage in question within a certain time was

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necessary to its validity, and that the appellant's loss results from his own neglect.

The husband, Edwin Francis, has no interest in the land liable to the mortgage.

He acquired none at the death of his wife as they had previously sold it, and under the statute he could only become a tenant by the curtesy in the real estate owned or possessed by her at her death.

Judgment affirmed.

Sam'l McKee for appellant.

C. B. Seymour for appellees.

SULLIVAN, &c. v. KUYKENDALL.

(Filed January 22, 1885.)

1. Presumptions—Letters—Evidence—The fact of mailing a letter properly addressed, with postage prepaid, creates no legal presumption that it was duly received; but it is merely a fact which is to be weighed along with other evidence in determining the question, and to which no more presumption attaches than to any other fact.

2. Telephone message—Evidence—Where A, desiring to talk over the telephone with B, asked the operator to call him, and the operator thereupon had a conversation with B, reporting to A, who was standing by, what B said as it came over the wire, Held—In subsequent action between A and B the former might prove by himself and others what the operator reported to him as coming from B, the operator being called and not remembering the conversation.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

By the terms of a verbal contract for the sale of personal property the appellants, Sullivan & Co., were to estimate and receive it within ten days after notice from the appellee, Kuykendall, that it was ready.

On January 26, 1880, he wrote them a letter, which by due course of mail should have been received by them within the next two days, but which in point of fact, as the testimony shows, was not received until February 17, 1880, notifying

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them that the property would be ready for them on February 9, 1880.

About February 11th or 12th, 1880, Green river began rising, and by the 13th of the same month had overflowed its banks, and the property being along them, was in the main destroyed.

The letter above named was properly enveloped, stamped and deposited in the postoffice, and addressed to the appellants at their usual postoffice.

The lower court in substance instructed the jury that if they believed from the evidence that said letter was written; addressed to the appellants at their proper postoffice; duly stamped, and placed in the office, then the presumption was that it was received in due course of mail, and that this presumption must prevail unless overthrown by satisfactory evidence that it was not so received.

This instruction was doubtless based upon the statement to be found in some text books, and a few cases to the effect that when a letter is sent by the post it is to be presumed from the known course in that department of the public service that it reached its destination at the usual time, and was received by the person to whom it was addressed, if living there, and usually receiving his letters at that place.

It will be found, however, that the most of these cases go no further than to hold that in the absence of all other evidence upon the point that the mailing of a letter, properly directed, raises a presumption that it was received; and that this presumption must prevail unless rebutted by other testimony.

In the leading case of Huntley v. Whittier, 105 Mass., 391, the learned judge (Gray, J.) said that the depositing of a letter in the postoffice, addressed to a merchant at his place of business, is prima facie evidence that he received it in the ordinary course of mail; but that the jury should be so instructed only in the absence of other testimony upon the point.

The case of Russell v. Buckley, 4 R. I., 525, is to the same effect; while authority is abundant that the mailing of a letter creates no presumption whatever that it was duly received.

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In United States v. Babcock, 3 Dillon's C. C. Reports, 571, Judge Dillon uses this language: "Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known postoffice address, prepaid, and actually deposited in the postoffice we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in Commonwealth v. Jeffries, 7 Allen, 568, that this is evidence tending to show that such letters reached their destination; and were received by the persons to whom they were addressed."

This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters.

In the case of negotiable paper it has long been held that the depositing of a letter in the postoffice by the holder to the indorsers is not only good prima facie evidence, but sufficient to establish the fact that notice was given; but this rule has been established by the law merchant through commercial necessity.

By the common law this presumption did not exist even as to negotiable paper; and after a careful examination of the authorities we are satisfied that it ought not to be held to arise in ordinary business transactions, and especially between men whose business does not require them to watch the arrival of the mails. (Freeman v. Morey, 4 Me., 50; Nat. Bank v. McManigle, 69 Penn., 156; Greenfield Bank v. Crafts, &c., 4 Allen, 447.)

The mailing of the letter in this instance created no legal presumption, but was proper testimony to be considered by the jury, together with the other evidence, in determining when it was received, and they should not have been instructed that a presumption arose from it, which must prevail unless overthrown by other satisfactory evidence.

The instructions in other respects were unobjectionable.

The appellants relied upon an alleged new contract between them and the appellee by which the one sued upon was an-

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nulled; but this was a question of fact as to which the testimony was conflicting, and the finding of the jury would not, therefore, be disturbed, if this were the only question presented by this appeal.

In view of another trial of the case it is proper that we should pass upon what seems to us to be a new question as to the competency of certain testimony; at least we have been unable to find any direct authority upon it.

The appellee upon going to the place, on February 9, 1880, where the property was to be received did not find the appellants or any one representing them there.

He thereupon went to a telephone office at Morgantown, Ky., for the purpose of communicating with the appellants at Bowling Green, Ky.; and not being accustomed to the use of the instrument he got the operator to talk for him. He first directed him to call for the appellant, Sullivan, and he did so, the Bowling Green operator reporting back that he would send for him to come to the office. Presently the Morgantown operator told the appellee that Sullivan was at the Bowling Green office and desired to know what was wanted; and thereupon a conversation took place, Sullivan using the instrument himself while the Morgantown operator talked for the appellee, and told him what Sullivan said as it came over the wire.

The latter testifies that on that day he had a conversation over the telephone with some one at Morgantown, and upon the same subject to which the appellee says the conversation related; but they differ widely as to what was said. The Morgantown operator, being introduced as a witness, testifies that upon the day named he had a conversation upon that subject with some one at Bowling Green, whom the operator there told him was Sullivan, but that he does not recollect what was said. Under this state of case the court below permitted the appellee to prove by himself and two other persons, who were present at the time, what the Morgantown operator reported

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to appellee, while the conversation was going on over the wire, as being said by Sullivan.

It is certain that the latter did talk over the wire, because he says so. The appellee did not pay the telephone charge, and it does not appear who did, save the Bowling Green operator reported to the Morgantown one that Sullivan would do so, and the latter is silent upon this point.

It would beyond question have been competent to prove by the Morgantown operator what Sullivan said to him; but whether his report to the appellee of what Sullivan was saying, made as the conversation progressed, is competent or falls within the domain of incompetent testimony is a question of importance in view of the astonishing growth of the business to which it relates, and one not free from difficulty.

In the case of a telegram the original must usually be produced in evidence, or its loss shown, before its contents can be proven or the copy delivered by the operator to the party receiving the message used, unless it be where the copy becomes primary testimony by the telegraph company being the agent of the sender.

In the use of the telephone, however, the parties talk with each other as if face to face; and, save where a message is sent, there is no written evidence of what has passed. By inventive means they are brought together for the transaction of business.

It is a well-settled rule that where one through an interpreter makes statements to another, that the interpreter's statement made at the time of what was so said is competent evidence against the party.

The interpreter need not be called to prove it; but the interpreter's statement made at the time may be proven by third persons, who were present and heard it. (Camerlin v. Palmer Co., 10 Allen, 539; Schearer v. Harber, 36 Ind., 536; 1 Greenleaf's Evi., section 183; 1 Phillip's Evi., 519, side page.)

The reason of this rule is, that the interpreter is the agent of both parties, and acting at the time within the scope of his

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authority; and we have been unable to draw any satisfactory distinction between this case and the one under consideration.

The argument is at least plausible, if not correct, that the testimony in question is competent as a part of the res gestæ, aside from the question of agency.

It is true the parties can not see each other; but the statements of an interpreter between blind persons could be proven by third parties, without calling the interpreter as a witness; and by telephonic means persons are as much together for all purposes of conversation and actors in what may be occurring as if they were immediately present with each other.

We must not be understood, however, as holding the testimony competent upon the above ground because there is another reason for so ruling which is conclusive to our minds.

Subject to various qualifications the old rule that a party must produce the best evidence within his power to prove a fact should govern. But as business expands by the aid of new inventions wider scope must be given to the rules of evidence. There is no need, however, of any departure or innovation in this case because it is a well-settled rule of evidence that the statements of an agent, when acting within the scope of his agency, are competent against his principal.

When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him his agent to repeat what he is saying to another party; and in such a case certainly the statements of the operator are competent, being the declarations of the agent made during the progress of the transaction.

If he is ignorant whether he is talking to the person with whom he wishes to communicate or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator because the per-

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son using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence.

Judgment reversed.

Judge Pryor delivered the following dissenting opinion:

The question decided in this case is novel and of great importance to the commercial world.

The terms of a contract are attempted to be established by messages alleged to have been forwarded by the one to the other of the parties over a line of telephone extending from Morgantown to Bowling Green.

The appellee being desirous of showing that the appellant agreed to receive a lot of hooppoles on the bank of Green river within a certain time, applied to the telephone agent at Morgantown to ascertain from Sullivan, the appellant, at Bowling Green, why he did not attend for the purpose of receiving the poles. The agent at Morgantown telephoned to the agent at Bowling Green in regard to Sullivan, and sent a message back that Sullivan was present at Bowling Green and would answer for himself.

The message sent by Sullivan was (as Sullivan swears, and that fact is nowhere contradicted) to the effect that he had not been notified that the hooppoles were ready, and, therefore, did not send to receive them. The appellee says that the message he received from Sullivan at Bowling Green was that the agent of appellant was sick, and for that reason did not send him down. This is denied by Sullivan, and the operator at Morgantown recollects that the message was in regard to the hooppoles, but fails to recollect what it was. The appellee was then allowed to prove what the agent at Morgantown told him as to the character of the message, and that was "that he failed to send because Allen was sick." He was also allowed to prove, by one or two others in the room, that the telegraph

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operator at Morgantown made that statement to the appellee. It is not pretended that either the appellee or those present heard what was said by the appellant, and all they know as to the nature of the response made to appellee's inquiry is what was told them by the operator, who does not himself recollect what the response was. It is difficult to understand upon what principle this testimony is to be admitted. It can not be said that the operator at Morgantown was the agent of Sullivan, the appellant, at Bowling Green, and for that reason his admissions are binding on the principal. Nor can it be said that he was the agent of Sullivan for the purpose of ascertaining what the contract was, but on the contrary he was the agent of the appellee. The latter wanted this agent to inquire of Sullivan, who doubtless did not even know him, why he had failed to take the hooppoles on a named day, and the information was given him by Sullivan, as the latter admits. But this admission appellee says is untrue because the agent of the appellee told other parties, not in the presence of Sullivan, that the reason you failed to come was that your man was sick. The agent don't recollect what the message was, but those present recollect what the agent said it was.

A telephone agent who makes an inquiry through the telephone for the benefit of, and at the instance of, another is not made the agent of the party responding. The relation of principal and agent can not arise further than to admit the testimony of the operator as to what the conversation was. He will not be allowed to close his mouth, and others permitted to testify as to his statements of what passed between him and the party sought to be made liable.

The human voice, by means of this remarkable discovery, may be heard at almost any distance. It requires neither science or skill to use it as a means of conversation, and the result is that almost any one in the office may be called on to use it for others, and to establish the rule that the declarations of the one receiving the message as to the substance of the re-

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sponse made is subvertive not only of a well-recognized rule of evidence, but dangerous in its application.

The operator is not an interpreter in a legal sense. When persons of different nationalities are unable to understand each other they call on an interpreter and he speaks for them—in their presence—those present hear his statements. This is original testimony, as much so as if the same witnesses were present and heard the parties themselves conversing with each other. There is no analogy between the case of an interpreter and that of a telephone operator. Here the parties conversing are miles apart; the one is called to respond to the other; when Sullivan responds he is responding to Kuykendall, although through the agency of another. That operator can swear to what the statements were, but his declarations are no more competent than if Kuykendall himself had talked to Sullivan, and reported to others what Sullivan said. If the operator's statements are competent, so would Kuykendall's have been if he had made the inquiry and heard the response.

That one may consult another, his agent, by telephone is not questioned, but that one who responds to an inquiry makes the party to whom he responds such an agent as that the latter's declarations are competent against him, I deny.

To illustrate the position assumed in this case, and leaving the telephone for a brief moment: The appellee sends the operator at Morgantown to Bowling Green to know of Sullivan why he failed to take the timbers. He makes the inquiry of Sullivan, and reports to those present in the room at the time that Sullivan told him it was because "Allen was sick." This Sullivan denies. Is it then competent for Kuykendall to prove by those present (the operator not recollecting) what report the operator made to them? If Sullivan heard what the operator said to the bystanders it would be competent, or if it could be inferred that he heard what was said it might be competent, but when you concede that he did not hear, as must have been the case when he was telephoned, it would be clearly incompetent. The operator would be as much the agent of

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Sullivan in the one case as in the other, but really not the agent in either instance.

Two merchants on one side of Main street propose to buy 100 barrels of pork from a merchant on the opposite side. The one directs his clerk to telephone the merchant on the opposite side of the street that he will give him $10 per barrel for the 100 barrels. The clerk telephones and reports the response to his principal and those present that the proposition is accepted. The other merchant, who has no telephone, directs his clerk to step to the door and call to the merchant on the opposite side, making the same proposition. He does so, and reports an acceptance of the proposition. The merchant refuses to deliver the pork in either instance because he says he agreed to take $12 per barrel, and this was his response, and he proves this to have been the response made by himself and those present. The two clerks fail to recollect what the response was, but it is offered in each instance to prove the report made by the two clerks to their principal, and in this manner contradict the statements of those who heard the response made. Can such testimony be competent? It is certainly incompetent in the one case and not competent in the other unless the necessities of trade connected with this new discovery requires a departure from a well-recognized rule of evidence.

It is at last a question solely as to what the conversation was. Those who heard it are competent witnesses, but their statements to others as to what they heard are inadmissible.

Suppose Sullivan, instead of talking himself, had conversed through the operator at Bowling Green, then the statements of the operator at Morgantown, according to the principal opinion, could be competent to contradict the oath of the operator at Bowling Green as to the message sent by him. That this could be done if the operator at Morgantown was called as a witness is not doubted, but his statements to others as to the conversation should have been excluded. Nor can such testimony be admitted upon the ground that it was the best testi-

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mony the appellee under the circumstances could produce. Such a rule would open the door for all hearsay testimony.

Such agents could easily be found willing to report a conversation to others that they would not swear to themselves.

It is maintained, however, that this operator was an agent, and acting within the scope of his authority, and, therefore, his statements are admissible. What was the scope of his authority? Are the statements of an agent for a special purpose admissible to prove the extent of his authority? If so, it is a novel doctrine. The acts of an agent may be permitted so as to presume general authority, but where the power is special and he departs from it his transaction is void. So if A authorizes B to tell C that I will take his poles on a fixed day, and B tells him that A will take them ten days prior to that time, there being no other agency, he has no power to bind A, and certainly his statements are not competent to show the extent of the special agency.

The testimony is purely hearsay, and all the reasons induced by consideration of both public and private interests for excluding that character of testimony apply with great force to this case. While I concur in the reversal of the judgment, I must dissent from so much of the opinion as authorizes the admission of this testimony.

Halsell & Mitchell and E. W. Hines for appellants.

N. A. Porter for appellee.

STUBBINS v. MITCHELL.

(Filed January 24, 1885.)

1. Surety—Contribution—Where a surety pays the debt by giving his note for it he is entitled to contribution from his co-surety, just as if he had paid in cash; and if the creditor should return the note to him unpaid as a present, he may still have contribution just as if he had been compelled to pay it.

2. Execution sale—Setting aside—Lien—Where property is sold under execution for more than is in fact due the sale should be set aside, but the lien under the execution is still good.

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Appeal from Warren Circuit Court.

Opinion of the court by Judge Lewis.

In 1874 Mary Stubbins, as principal, and appellant and appellee, sureties, gave to Robinson their promissory note for $1,824.20, upon which, in 1875, he recovered a judgment which the defendants replevied in the office, W. H. Payne being then surety in the bond, but afterwards released by operation of law.

February 23, 1876, in consideration of $100 then paid and his promissory note for the balance then due on the replevin bond payable one day after date, Robinson, in writing endorsed thereon, assigned the replevin bond to appellee Mitchell for his use and benefit without recourse.

August 16, 1877, an execution endorsed for the use and benefit of Mitchell was issued on the replevin bond, which was staid by his order. Afterwards from notes placed in the hands of Mitchell by Mary Stubbins, the principal in the note, he realized at one time $74.11, and at another $1,616.62, which were credited on the replevin bond. And an execution endorsed as before mentioned was levied upon the property of appellant, his co-surety, which, October 27, 1879, was sold for the sum of $——.

This action was instituted by appellant September, 1880, for the purpose of obtaining judgment setting aside the sale of his property under the execution, restoring the property to him, and perpetually enjoining Mitchell collecting or coercing any money from him on account of the replevin bond.

It was upon final trial of the action adjudged by the court that Mitchell had discharged the debt upon which he and appellant Stubbins were jointly bound, and had the right to have the execution upon the replevin bond endorsed for his benefit, and to levy and sale for one-half what he paid thereon. But the sale was set aside because it was made for a greater sum than was due from appellant to appellee. It was further adjudged that appellant had acquired a lien upon the property levied on, and has the right to a writ of venditioni exponas.

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It is contended on this appeal that the note executed by appellee was not such a payment as entitles him to contribution from appellant, his co-surety; second, that appellee had no right to proceed against appellant for contribution while Mary Stubbins had property subject to the debt; third, that the execution should have been quashed. It is further contended by counsel that inasmuch as the creditor, Robinson, some time after it was executed, surrendered the note to appellee without payment, the latter having in fact paid nothing, is not entitled to contribution from his co-surety.

In the case of Atkinson v. Stewart, 2 B. Mon., 348, it was held, as had been previously decided in Robertson v. Maxcey, 6 Dana, 101, that when a surety pays off a note by a note in part and money for the residue, and the principal be insolvent, such surety has a right to demand contribution from the other joint sureties, though the substituted note be not fully paid.

So it should be now considered settled, and in our opinion correctly settled, that as between co-sureties a discharge of their obligation by the acceptance in lieu of it of the note of one of them must be deemed a payment in money, in the meaning of the statute.

In this case we think it clear that all had been paid by the principal in the note that could be coerced from her by process of law, and she was insolvent when appellee caused the execution upon the replevin bond to be levied on the property of appellant to satisfy his one-half of the debt then unpaid.

The creditor, Robinson, not only accepted from appellee $100 in money and his note for the residue of his debt, but assigned and transferred the replevin bond to him, thus placing it out of his power thereafter to coerce the payment of the replevin bond from the parties to it, which was equivalent to a payment and discharge of it by appellee.

The note given by appellee to Robinson is shown by the evidence to have been executed at the suggestion of the latter, and in good faith, and with the intention and expectation on the part of appellee to pay it, as he was legally bound to do.

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But a short time before the death of Robinson he delivered the note to appellee, and, as stated by appellee in consideration of their long friendship, made him a present of it. It is, however, stated by a witness that on one occasion he heard a conversation between appellee and Robinson, in which the former promised to pay back to Robinson's wife, if living, and if not to his estate, whatever he, appellee, might collect on the original debt. But whether Robinson gave him the note absolutely, or made the payment of it conditional upon his collecting the original debt, makes no difference. The question is whether appellee has lost his right to contribution merely because Robinson has seen proper through his friendship to make the payment of the note conditional or to give it up absolutely. It seems to us that appellee having, by the payment of $100 and the execution of the note, divested Robinson of all interest in the replevin bond, and the right to coerce satisfaction of it, and himself acquired by assignment the benefit of it, they might thereafter make whatever agreement as to the payment of the note they saw proper, and that if Robinson chose from feelings of friendship to either indulge appellee as to the time and manner of payment or to release him altogether, appellant has no right to claim profit and advantage to himself on that account nor to complain. For he neither paid to Robinson any part of was what originally due on the replevin bond, nor became bound in any manner to pay or contribute to the payment of the note given by appellee to Robinson.

It does not follow, as counsel contend, that because the sale ought to have been set aside for the reason stated in the judgment, the execution should have been quashed. The lien upon the property levied on still remained, and the court properly adjudged appellee entitled to a writ of venditioni exponas.

Judgment affirmed.

B. F. Proctor and E. W. Hines for appellant.

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KENTUCKY CENTRAL R. R. CO. v. BOURBON CO.

(Filed January 24, 1885.)

1. Taxation—Railroads—Exemption—Constitutional law—Where a railroad charter provided that on each $100 of its stock a specified sum, and "no more," should be paid for State purposes, Held—The term "no more" is a limitation on the amount of tax to be levied on the road for State purposes only, and that a subsequent act imposing an additional tax for county purposes is constitutional.

2. Statutory construction—Immunity from taxation—An act granting immunity from taxation is to be strictly construed against the grantee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Hines.

The question presented on this appeal is whether appellee, "the Kentucky Central Railroad Co.," is subject to taxation for county purposes.

By an act approved March 1, 1847, the "Licking and Lexington Railroad Co." was incorporated. By an act approved February 27, 1849, the name of the company was changed to the "Covington and Lexington Railroad Co."

March 3, 1851, this charter was amended, and among other provisions is the following: "That on the first day of January next, after the first declaration of dividends on the capital stock of said railroad company, and on the first day of January thereafter, it shall be the duty of the president and directors of said company to pay into the treasury of this Commonwealth a tax on each $100 worth of stock in said railroad company, equivalent to the rate of tax on each $100 worth of property for State revenue and no more; and resident stockholders shall not list their stock in said company for revenue tax, nor be liable to payment of tax on the same in any other mode whatever."

February 22, 1871, the "Kentucky Central Railroad Company" was incorporated "for the purpose of operating the Covington and Lexington railroad, of which they are the owners by purchase under judgment and order of sale of the Fayette Circuit Court; and shall have, and are hereby invested with, all the powers, privileges, and rights, immunities and fran-

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chises, subject to the restrictions and limitations contained in the original charter of incorporation, authorizing the construction of said railroad and the various acts amendatory thereof. Provided nothing in this act shall be held to subject the said powers, rights, immunities and privileges purchased under judgment and order of sale of the Fayette Circuit Court, and hereby vested in the corporation by this act created to the operation of an act entitled, 'An act reserving the right to amend or repeal charters or other laws, approved 14th of February, 1856.' "

On the 3d of April, 1878, the legislature provided a board of commissioners to ascertain the value of railroad property in the State subject to taxation for revenue, county and municipal, purposes, to ascertain the value of such property within county and municipal boundaries, and made it the duty of the commissioners to report their valuation to the auditor, who should report the same to the clerk of the county court. The fourth section of the act provides that "the same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by said board of the railroad, rolling stock and real estate of such company; and at the same rate of taxation for the purposes of each county, city, town or precinct in which any portion of any railroad is located, which is or may be in any year levied on any real estate therein, shall be, and is hereby, levied."

It is insisted for appellant that the act of 1878, fixing a different method of taxation and possibly thereby increasing the tax limited in the charter of the company, violates the provisions of the Federal and State Constitutions forbidding the passage of any law impairing the obligation of a contract.

We refrain from considering how far the legislature may contract away the sovereignty of the State in reference to the right of taxation, since the question may be determined without it. Conceding such right, when not forbidden by the State Constitution, the inquiry remains—has it been exercised?

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The statute under which the exemption is claimed reads: "Shall pay into the treasury of this Commonwealth a tax on each $100 worth of stock in said railroad company equivalent to the rate of tax on each $100 worth of property for State revenue, and no more."

The subject treated of is State revenue, and the taxes provided for are to be paid into the State treasury. There is no reference, express or by implication, to county or municipal taxation. The general law at the passage of this act provided for county and municipal taxation, and in order to exclude the operation of such general law the intention should have been unequivocally expressed. This is true in the interpretation of statutes in ordinary cases, and in the construction of statutes limiting the taxing power of the State the presumption that nothing more was intended than is in terms expressed is much stronger. Taxation is an essential attribute of sovereignty, necessary to the life and the autonomy of the State, and can be surrendered only in exceptional cases, and then only by express grant. Every intendment is against the intention to surrender such power. In Bailey v. Magwire, 22 Wall., 227, it is said: "It is never for the interest of the State to surrender the power of taxation, and an intention to do so will not be imputed to it unless the language employed leaves no other alternative." This was a case where a railroad company was seeking exemption from county and municipal taxation under a provision in the charter exempting it from State taxation. The court held the company subject to county and municipal taxation.

The term "no more" used in the statute applies to the taxes provided to be paid into the State treasury, and is a limitation only upon the amount of tax that may be assessed for that purpose.

The act of 1878 providing a commission to equalize taxation of railroads expressly authorizes the method of valuation adopted in this case. That act has been declared constitutional by this court in the Railroad Tax Cases v. Commonwealth, 5 Ky. Law Rep., 445, January, 1884.

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Judgment affirmed.

John W. Stevenson for appellant.

A. Duvall, Matt Turney and Kelly Brent for appellee.

PARRINGIN v. PICKENS, &c.

(Filed January 20, 1885.)

Taxes—Delay in enforcing—Purchaser for value—Where the sheriff failed to collect taxes on land for more than five years after they were due, and then levied on the land and sold it to A. Held, That the lien for taxes was lost by such delay in enforcing it, and A could not hold the land as against B, a prior purchaser, for value from the owner.

Appeal from Clinton Circuit Court.

Opinion of the court by Chief Justice Hines.

Appellees brought this suit against appellant and one Snow to quiet title to a piece of land held by appellees under a commissioner's deed and claimed by Snow as purchaser at tax sale. Appellant, formerly sheriff of the county, claimed that one Bristow had not paid his taxes while appellant was sheriff for the years 1875, 1876, 1877 and 1878, and that in February, 1882, he levied upon and sold the land in controversy to satisfy these taxes for which he had become responsible while sheriff, and that Snow had become the purchaser for $181, and a certificate of said sale and purchase having been recorded Snow became the owner of the land.

Bristow was the owner of the land, but failing to pay in whole therefor the lien for the purchase money was enforced and appellees became the purchasers under decretal sale, received a commissioner's deed in June, 1881, and took possession of the land, then worth some $300, and immediately proceeded to expend large sums of money in erecting a mill thereon. In October, 1879, Bristow removed from the State, carrying with him visible personal property, such as horses, wagons, etc., to the value of some $3,000, and leaving in the State and county other real estate. The taxes were not as-

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sessed against the property in controversy except to the amount of about $5.04. Appellant knew of Bristow's intention to leave the State; knew of the sale of this land to appellees and of the improvements they were erecting, but asserted no claims for taxes until more than two years after Bristow left the State, nor until some eighteen months after the purchase and the taking of possession of the land by appellees. Appellees were ignorant of the existence of any claim for taxes until asserted by sale of the property. Appellant made no effort to enforce collection of the taxes until about five years after the expiration of his term of office as sheriff, during which time he had the same power of collection as the State had during his term and before he became responsible therefor. But his claim against the property of Bristow for the taxes was like that of any other individual holding a lien with the exception of the extraordinary facilities for collection by levy and sale. Such a claim, like any other, can be waived as against an innocent purchaser for value. By delaying the assertion of claim, by standing by and seeing the land purchased and improved without notification of claim, when during all these years he might have made the taxes out of other property of Bristow which was in lien therefor, appellant has waived his right and is now estopped to assert it against appellees. It is unnecessary to discuss the evidence as to the payment of the taxes by Bristow as relied upon, as the view herein expressed authorized the judgment of the court below quieting appellees' title.

Judgment affirmed.

Sandidge & Craddock and J. A. Brents for appellant.

T. C. Winfrey and James Garnett for appellees.

MORGAN'S ADM'R v. THOMPSON, &c.

(Filed November 22, 1884.)

Damages—Malicious injuries—Agent—The personal representative of one who has been intentionally and maliciously killed can not bring an action against the slayer, or against the person by whom the slayer was employed at the time, to recover damages for the deed.

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Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by an administrator against the owners of a steamboat to recover damages for the loss of the life of the intestate who was shot and killed by the second mate of the vessel.

Upon the conclusion of the evidence introduced on the trial by the plaintiff the jury, under a peremptory instruction by the court, returned a verdict for the defendant, and judgment having been rendered in accordance with the verdict the plaintiff appeals.

It is in substance alleged that the defendants were before and at the time of the killing owners of the steamer Charles Morgan, and common carriers; that Gabe Morgan, the deceased, was hired by them and shipped on the steamer as a deckhand, and while engaged in the line of his duty as such at the port of Louisville, where the vessel had landed, he was by the willful neglect of the defendants, their agents or servants, and without fault or cause on his part, shot and killed by one Fountain, acting under authority of defendants as mate, and under color of his authority as an officer of the vessel.

If this action can be maintained at all it must be done under the statutes of this State.

It can not be maintained under section 6, chapter 1, General Statutes. For although by that section a right of action exists when a person is killed by another, by either the careless, wanton or malicious use of firearms or other deadly weapon, not in self-defense, still, even if the section could be construed to authorize the action against another than the person committing the deed, which we do not think can be done, only the widow and minor children of the person killed can sue, the right of action not being given to the personal representative. The only right of action then, if appellant has any, exists by virtue of section 3, chapter 57, which is as follows:

"If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or

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companies, corporation or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

By the terms of the section the right of action is given to the personal representative as well as the widow and heir of the person whose life is lost or destroyed, but the cause of action arises from willful neglect, and as has been held by this court, in the case of Spring's Adm'r v. Glenn, 12 Bush, 172, "the statute gives no right to the personal representatives to maintain an action when the killing is malicious and intentional on the part of the party charged."

It, therefore, becomes necessary to determine whether the life of plaintiff's intestate was destroyed by the mate of the steamboat intentionally or resulted from willful neglect on the part of the owners of the vessel or their agent or servant. For as held in the case just cited, and as is apparent from the language used in the section, there is a distinction made between willful negligence, whereby the life of a person is lost, for which a right of action is given to the personal representative, and the intentional destruction of life, for which no right of action is given to him.

The plaintiff in his pleadings alleges that the life of his intestate was lost by the willful neglect of the defendants or their agent and servant. But the statement of the circumstances under which it occurred developes a case of intentional homicide. For it is not only alleged that the deceased was killed without any fault or cause on his part, but if he was killed in the manner and under the circumstances stated, the act of the mate of the vessel who killed him was not only intentional, but amounted to deliberate murder.

As was said in the case of Spring's Adm'r v. Glenn, the issue of fact here presented is rather novel. For it seems to have been regarded as necessary by the plaintiff, in order to sustain his action, to allege and prove that his intestate was not in-

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tentionally slain, but lost his life through the willful negligence of the defendants and their agent and servant, Fountain, while the defendants plead and undertake to show that he was intentionally killed by the mate of the vessel. But the evidence introduced by the plaintiff shows conclusively that his intestate was intentionally killed by the second mate, and whatever might be made to appear in extenuation of the act, as this record stands, it was not only intentional, but without any excuse or extenuation.

It was, in our opinion, proper for the court to give the peremptory instruction, for no authority exists by statute for the personal representative to maintain an action for the destruction of his intestate's life when it is intentionally taken, even against the slayer, much less against others who are not alleged to have aided and assisted.

The judgment must be affirmed.

W. C. Trabue and I. H. Trabue for appellant.

Kinney & Kinney and J. T. O'Neal for appellees.

NEW BOOKS.

Kentucky, A. Pioneer Commonwealth; By N. S. Shaler; Houghton, Mifflin & Co., Boston, Mass., 1885.

This is a very readable book. A dull page can not be found between its covers, though the first half of it is more thoughtful and carefully written than the latter, the lofty and philosophic tone of the beginning being quite dissipated by the excitement of the war period, where it seems to be assured that the history of the State during the eventful years from between '61 to '65, is made up of a narrative of the exploits of Morgan's men. A flattering picture is drawn of Kentucky and Kentuckians, though our defects are not entirely glossed over, especially on the educational question. It is a strange fact that both political parties in this State meet every four years

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in formal convention and adopt a long string of resolutions relative to national questions, and yet have so little to say (or so little that is definite, certain, and practicable) about this question of education. It is a vital question, one that demands attention and a clear, well-defined policy devising a system of taxation that will yield a certain, adequate revenue to support schools in every part of the State and to compel attendance on them. Here we are with thirty-four men in every 100 unable to read or write, while other States, Iowa for instance, can show ninety-eight in every 100 who can both read and write. So our policy of immigration is of doubtful propriety. True it has its advantages in preserving the original purity of the stock from which we have sprung, and in keeping out the scum and refuse of Europe, which forms so large a part of American immigration, but the great Northwestern States which keep agents at Castle Garden to solicit immigrants as soon as they land in New York have prospered marvelously, and have far outstripped us in wealth, who started thirty to fifty years before them. The value of every healthy man added to the State is $3,000. The question is a great one, and demands thought and discussion from both individuals and parties in order to clear away doubts and to shape a wise policy for the State upon the subject.

Cession of the Northwest Territory and the Ordinance of 1787. An address delivered before the alumni of the University of Virginia, July 2, 1884, by Alex. P. Humphrey.

The ordinance, it will be remembered, is the act of the Continential Congress establishing a new empire out of those lands which Virginia had previously ceded to the central government, and setting forth the general principles on which the whole territory was to be forever governed. Of this ordinance the orator eloquently remarks: "In desert countries the fame of that man rests secure for all generations who, traveling over its arid sands, has the courage to stay his haste and so dig a well that men coming after him may find water thereof which

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they may drink and be refreshed. Three such perennial fountains were opened by those who guided the councils of America in the period of which I am speaking. They are the Declaration of Independence, the ordinance of 1787, and the Constitution." The ordinance, as at first reported to congress by Mr. Jefferson, proposed to prohibit slavery in the territory both south and north of the Ohio, but the prohibition was restricted to the north side on motion of Mr. Spaight, of North Carolina, whom we agree with Mr. Jefferson in calling "a young fool." It is to be regretted that the address did not have more careful proof reading. On the first page, and in almost the first paragraph, we find the lines from Henry the Eighth—

No day without a deed to crown it—

aptly used to describe the stirring events of the revolution, spoiled into unintelligible nonsense by the printer.

Law Quarterly Review. Edited by Frederick Pollock, LL. D. Published by C. C. Soule, Boston, Mass., and Stevens & Son, London.

This is the first number of a New English American Magazine, which, having a constituency on both sides of the Atlantic to draw from, is to be sustained at the low price of $2.15 per annum. The editor, Mr. Fredrick Pollock, is one of the brightest law writers of the age. The gem of this number is the article on section 17 of the statute of frauds, redrawn and illustrated, written by Mr. Pollock and Mr. Justice Stephens jointly, the latter a writer of the same class as Mr. Pollock, with perhaps more considerable ability.

A very telling assault is made on the objectionable section (the one which requires contracts for the sale of goods worth more than 10 shillings to be in writing), this section contains only eighty-six words, but it has been a rich source of litigation. There are 178 leading cases on it, filling 619 pages. We have no such section in our statute of frauds, and, therefore,

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the article is deprived of much of its practical value to us, but it will be found very interesting reading. Speaking of reforming the law, Mr. Justice Stephens, who wrote the introduction, aptly says "one of the many difficulties which stand in the way of the law reformer, perhaps I might say the great difficulty, may be thus expressed. Those who have acquainted themselves with the provisions of the law have generally neither the time nor the inclination to undertake any other task than that of administering it as an existing system. Besides, when a man has mastered an intricate and difficult system, he takes a positive pleasure not only in the superiority which his knowledge gives him, but in that knowledge itself.

"On the other hand, those who have not a professional acquaintance with law are almost certain to be baffled in any attempt which they may make to improve it by their ignorance of the subject. It has real and great difficulties, and to attempt to deal with the subject without careful previous study and a considerable amount of collateral knowledge is only to run the risk of making bad worse."

There are other interesting articles; one on "Homicide by Necessity;" another on "Federal Government," by Decey, a well-known law writer, which will be found particularly interesting. The reviews of new books are very sprightly.

Laws of Mexico, relating to Land, Mines, Water Rights, Personal Rights, Contracts and Inheritances. By Frederic Hall. A. L. Bancroft & Co., San Francisco, 1885.

This volume will likely prove more interesting outside of California than might be at first supposed from reading the title page, on account of the large attraction of capital to Mexico, which makes many curious to know about the laws there relative to contracts and lands. The body of the work is divided into short sections, numbered seriatim throughout the book, like a code, and aims to give a general idea of the provisions of the Code of the Mexican Republic, adopted last year,

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on the subject of Personal Relations and Personal Rights in Land and Moveables. We notice inter alia that a man can not give away the whole of his property, not reserving enough to support himself. Dower is defined as anything or sum which the wife gives the husband for the purpose of helping him sustain the charges of matrimony. But perhaps the most interesting part of the work to the general reader is their Federal Constitution, which is very like ours. There are three different departments—a president, two houses of congress (one of senators and one of deputies)—but the judges of the Federal Supreme Court are not appointed for life, but are elected for six years. Foreigners who own land are citizens. All citizens have the right to vote who are eighteen years old and married, or, if unmarried, twenty-one and have an honest mode of living. They do not believe in unrestricted suffrage.

Myer's Federal Decisions, arranged by William G. Myer, Corporations, vol. X. Gilbert Book Co., St. Louis, Mo., 1884.

This series of reports (as we have stated in previous numbers) is a reprint of all the federal reports, including the supreme, circuit and district courts, courts of claims and opinions of the attorneys-general, bringing within the reach of the bar generally many volumes of able and learned opinions that were before so rare, or so covered by copyright as to be practically inaccessible to the profession in this State. Besides this the peculiar feature of the work is that the cases are arranged according to subject-matter and not chronologically. Thus the contents of 292 volumes of these reports, so far as they bear on the subject of Corporations, are brought together in this one volume. Every case is given in full or digested. Of those digested and not reported in full Mr. Benjamin Vaughan Abbott certifies that they belong to one of the following classes: Either they relate to some local question or local corporation, without stating any general principle, or narrate long statements of facts, copying documents in full, and decide

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rights of parties without giving reasons or authorities; or state a general principle taken avowedly at second hand from some case given in full; or have been reversed or rendered obsolete by subsequent changes in the statutes. Even from these every grain of legal wisdom or principle has been carefully winnowed, and is presented in the digest portion of the work. This statement is made after careful examination of the work. There is an index to each volume.

NOTES.

An old lawyer in Paris had instructed a very young client of his to weep every time he struck the desk with his hand. Unfortunately the barrister forgot himself and struck the desk at the wrong moment. The client fell to sobbing and crying. "What is the matter with you?" asked the presiding judge. "Well, he told me to cry as often as he struck the table." Here was a nice predicament; but the astute lawyer was equal to the occasion. Addressing the jury he said: "Well, gentlemen, let me ask you how you can reconcile the idea of crime in conjunction with such candor and simplicity? I await your verdict with the most perfect confidence."

Pittacus, of Mitylene, made a law that he who when drunk committed an offense should suffer double the punishment which he would do when sober; and Plato, Aristotle and Plutarch applauded this as the height of wisdom.

Patrick McCarty, an Irishman, one day found a blanket from the government stores, marked in large letters U. S., for United States. Paddy at once rolled it up, put it under his arm, and said, "Yis, that's mine—U for Patrick, S for McCarty. Be me soul but this larnin is a foine thing. If I had

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not been well edicated I would niver av known the blanket to be moine at all, at all."

BENEFIT OF CLERGY.

The last time this plea was allowed in Kentucky was in the Barren Circuit Court, where a negro was on trial for rape before Judge Richard Buckner, and as the prosecutrix was a white woman he was sentenced to death, owing to the bitter prejudices of a white jury, although the evidence against him was clearly insufficient. The learned judge heartily sympathizing with the poor wretch, thought of this plea as a means of escape for him, and instructed his attorneys to make it. The negro being tendered the U. S. Constitution and found able to read it, he was accordingly burned in the hand and discharged from custody.

The plea was shortly afterwards (in 1847) abolished by the legislature.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Agency—

1. Rights of third parties buying from agent who violates instructions—An agent employed by appellant to manage his farm and take care of his stock abandoned one of appellant's horses as worthless, and allowed it to be taken away without objection. The horse recovered and was sold to appellee, who knew that the horse belonged to appellant.

   Held—That appellant is entitled to recover the horse. An express violation by the agent of his trust can not inure to the benefit of appellee and his vendor. Cummings v. Gerlick. January 28, 1885. Pendleton Ch. Ct. Opin. by Richards, J., Sup., Ct., rev. O'Hara & Bryan for appellant; Clarke & Applegate for appellee.

Appeals—

1. Void judgment—Motion to correct—An appeal can not be taken from a void judgment until a motion has been made in the inferior court to correct it. Lemming v. Mullins. January 17, 1885. Pendleton Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Clarke & Applegate for appellant; John H. Fryer for appellee.
2. From Superior Court—Limitation on right of—The right of appeal from the Superior Court to the Court of Appeals, where it exists at all, accrues immediately upon the rendition of the judgment, and is not affected by the provision of the Code allowing thirty days in which to file a petition for a rehearing, but if a party exercises his right to file a petition, the time during which the court has the petition under advisement will not be counted against him in determining whether his right to appeal is barred by limitation. C., O. & S. W. R. R. Co. v. Reasor, &c. January 7, 1885. Meade Cir. Ct. Opin. by Richards, J., Sup. Ct., granting appeal. H. Cummins and P. H. Darby for appellant; C. C. Fairleigh for appellees.
3. Reversal on questions of fact—This court can not reverse as to questions of fact, whether found by the court or jury, unless the finding is flagrantly against the evidence. Potts v. Powers. January 7, 1885. Nicholas Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Ross & Owens for appellant; Kennedy & Kennedy for appellee.

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4. Order vacating judgment reviewable—If a court by a void order attempts to vacate a judgment in one's favor he can have it reviewed on appeal, having first endeavored to set aside the vacating order by motion in the lower court.
5. Order sustaining motion relates back—The motion to set aside a judgment having been made in time, the order sustaining it relates back so as to bring the matter within the authority of the court. The order sustaining the motion to set aside the judgment in favor of appellant is, therefore, not void, and an appeal does not lie from an order refusing to set it aside. Boyse v. Linderberger, &c. January 9, 1885. Lou. L. & E. Ct. Opin. by Richards, J., Sup. Ct., rev. Elliott & Hemingray for appellant; John Stites for appellees.
6. Damages on affirmance—In a contest between attaching creditors and an assignee for the benefit of creditors, the fund in contest having been adjudged to the assignee upon the affirmance of the judgment from which the creditor appealed with supersedeas, the assignee is not entitled to damages, the judgment appealed from not being a judgment for the payment of money. Coffin v. Kelling. Robinson & Co. v. Basham & Cox's Ass'ee. January 9, 1885. Kenton Cir. & Lou. Ch. Cts. Opin. by Ward, P. J., Sup. Ct., overruling motion for damages.
7. Jurisdiction—Amount in controversy appellate court determines—When the judgment of the lower court is for the defendant, and the plaintiff appeals, the value in controversy is the amount claimed in the petition. Whether the allegations are sufficient to entitle him to the whole or any part of that sum can not be considered in determining the jurisdiction of an appellate court, as this is one of the questions to be tried on the appeal. Hayden v. Kollis' Adm'r. January 12, 1885. Owen Cir. Ct. Opin. by Richards, J., Sup. Ct., overruling motion to dismiss. J. W. Greene for appellant; Geo. C. Drane for appellee.
8. Satisfaction of judgment—A plaintiff waives his right to prosecute an appeal by ccercing either full or partial satisfaction of a judgment in his favor, but the appellee must present the record evidence of the coercion in order to entitle him to a dismissal of the appeal. Meek v. Lacy. January 14, 1885. Bath Cir. Ct. Opin. by Richards, J., Sup. Ct., overruling motion to file plea. R. Gudgell & Son for appellant; B. D. Lacy for appellee.

Arrest—

1. Powers of peace officer—A peace officer may make an arrest in obedience to a warrant of arrest delivered to him, or without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony. Palmer v. Commonwealth. January 13, 1885. Nelson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Ben Johnson for appellant; P. W. Hardin for appellee.

Assignee—See Vendor & Vendee, 2.

Attachment—

1. Town marshal can not execute—A town marshal is not authorized to ex-

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ecute an attachment, and no lien is acquired by the levy of an attachment by him. Citizens Savings Bank v. Miller, Cessna & Co. January 5, 1885. Elliott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. E. F. Dulin for appellant; Z. T. Young and M. M. Redwine for appellees.

2. Action on bond—Maliciously suing out—Joinder—Waiver—An action upon an attachment bond for wrongfully suing out an attachment, and an action for maliciously suing out an attachment, can not properly be joined, but if they have been joined and the defendants appear, fail to object and answer to the merits, they thereby waive the misjoinder, and can not afterward raise the qeustion.
3. Pleading—Necessary allegations—In an action for maliciously suing out an attachment it is necessary to allege and prove both malice and want of probable cause.
4. Damages—In a suit upon an attachment bond the finding should be limited to the actual damage sustained by reason of the issue and levy of the attachment, and the expenses incurred in defending the attachment. Duck, &c. v. Hollrook. January 28, 1885. Lee Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. I. N. Cardwell, J. & J. W. Rodman for appellants; H. C. Lilly & Son for appellee.

Bills and Notes—

1. Defenses against assignee—The mere knowledge by the payor of a note, at the time of its execution, that it is to be assigned to a third person does not deprive the payor of a defense admitted to be good against the assignor. Highbaugh v. Hubbard. January 14, 1885. Larue Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. A. B. Montgomery for appellant; W. P. D. Bush and Finlay F. Bush for appellee.
2. Renewal—Defense subsequently discovered—The mere renewal of a note with a stipulation for a higher rate of interest, where all consideration except that supporting the old note is excluded, does not preclude any defense thereafter discovered which existed against the old note. Highbaugh v. Hubbard. January 14, 1885. Larue Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. A. B. Montgomery for appellant; W. P. D. Bush and Finlay F. Bush for appellee.

Courts—

1. Louisville Law and Equity Court—Power over transferred cases—Where a cause is transferred from the Louisville Chancery Court to the law and equity court upon the affidavit of one of the parties that the chancellor will not afford him a fair and impartial trial, the judge of the law and equity court, who now has all the jurisdiction the vice chancellor had, has power to set aside an order of the chancellor made before the transfer. Nevin v. Allen, &c. January 19, 1885. Lou. L. and E. Ct. Opin. by Richards, J., Sup. Ct., dis. Sam'l B. Richardson for appellant; James S. Pirtle and Geo. B. Eastin for appellees.

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Damages—

1. Jury limited by evidence—Where the jury must fix the amount of damages to be awarded the court should tell them that they are limited by the evidence.
2. Exemplary damages—Exemplary damages can not be awarded for any grade of negligence short of gross, which, in any business, is the absence of such diligence as careless and inattentive persons usually exercise in the prosecution of the same business, or business of like character. It was error in this case to instruct the jury that they might award exemplary damages, if they found the defendant guilty of wanton and reckless negligence, which, as defined by the court, was not equivalent to gross negligence. Brenner & Seller v. Renner. January 7, 1885. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. T. F. Hallam for appellants; J. F. & C. H. Fisk for appellee.
3. Exemplary—Improper instruction—If the conductor of a railroad train, in connection with negligence, treats a female passenger "with insult, indignity, oppression or inhumanity," in an action against the company for the negligence the question of exemplary damages ought to be submitted to the jury, but it was error in this case to instruct the jury that mere "indecorous" conduct on the part of the conductor in connection with the negligence was sufficient to authorize them to award damages "in their discretion," not exceeding the amount claimed in the petition. L. & N. R. R. Co. v. Ballard. January 16, 1885. Marion Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Wm. Lindsay and Rountree & Lisle for appellant; Hill & Rives for appellee.

Decedents' Estates—

1. Suit for settlement—A personal representative is authorized by statute to institute suit for the settlement of the decedent's estate, and if the personal estate will not pay the debts the court may order the sale of land. The fact that there is no personal estate does not preclude the personal representative from suing. Courts' Adm'r v. Courts. January 14, 1885. Bracken Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. R. K. Smith and W. V. Widden for appellant; A. Duvall for appellee.

Deeds—

1. Construction—Fee simple conveyed—The construction of deeds is favorable to their validity, and the object of all rules of construction is to effectuate the intention of the parties to the instrument; in arriving at that intention the entire instrument is to be considered, whether it be a deed or other writing.

   In a deed by husband and wife to the wife's land, both were named as parties of the first part, but neither was named in the granting clause, the words "have granted, bargained and sold, and do hereby sell and convey," etc., being introduced without a subject.

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Held—That there can be no doubt from the language of the deed that the grantors intended to, and did, convey the absolute fee. Ferrill v. Cleveland, &c. January 20, 1885. Lou. Ch. Ct. Opin. by Holt, J., Ct. Ap., aff. Sam. W. Railey for appellant; John Stites for appellees.

Devise—

1. Construction, resale and re-investment—A testator, by his will, directed the proceeds of his estate to be invested in real porperty, to be held and enjoyed by his children during life, and then descend to his grandchildren, with a provision prohibiting a resale or re-investment after the money had been once invested.

   Held—That the will created an estate for life in the testator's children, and that the provision against a resale or re-investment was not intended as a limitation or restriction upon the estate after it should pass to the grandchildren, but to prevent a re-investment during the life of the life tenant. Prewitt v. Prewitt. January 15, 1885. Clark Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. J. F. Winn for appellant; W. M. Beckner and Haggard & Benton for appellee.

2. Construction—Death of devisee—A testator provided that his estate be divided between his children and "their heirs as herein set forth, first paying all my just debts and funeral expenses, and deducting from the shares of the following named children the amounts paid to them, namely: * * * * Kate Caldwell, $400 for a negro girl and horse and saddle, and besides which I give her daughter, Ruby Caldwell, $1,000 as her legacy in full in my estate," etc. Ruby Caldwell claims under the will the interest of her mother in addition to the $1,000 specially bequeathed to her. It is not stated in the pleadings or proved that the mother of Ruby was dead when the will was made, but it is alleged, and not denied, that she died before the testator.

   Held—That the legitimate inference from the language of the will is that Kate Caldwell, the mother, was dead when the will was written, and that the testator intended Ruby Caldwell, the daughter, to take under it $1,000 and no more. Caldwell v. Glasscock, &c. January 31 1885. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Hines, Ch. J., dissenting. E. E. McKay for appellant; Wm. Lindsay and Geo. S. Fulton for appellees.

Estoppel—

1. By announcement made at judicial sale land was ordered to be sold by the commissioner. At the sale appellant's attorney stated that part of the land had already been bought by appellee. Appellant was thus enabled to buy the land at a small price, other bidders being frightened off by the announcement,

   Held—That in a susbequent action between the two appellant was estopped to deny appellee's right.

2. Even an infant who has a right to an estate and permits or encourages a representation as to it which works a fraud will, as in the case of a married woman, be refused any relief as to it. Kendall, &c. v. Webber,

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&c. January 24, 1885. Harrison Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. J. Q. Ward and L. Desha, jr., for appellants; A. H. Ward for appellees.

Final Order—

1. Order reviving action—An order reviving an action is not a final order from which an appeal can be prosecuted; if the action is improperly revived the action of the court relative thereto may be reviewed when a final judgment is rendered, if the final judgment be one from which an appeal can be prosecuted.

   The final judgment in this case being for only $66, the appeal is dismissed. Reeves, &c. v. Davis' Adm'r. January 23, 1885. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., dis. W. H. Cord and Thos. F. Hargis for appellants; J. H. Power and E. W. Hines for appellee.

2. Order setting aside order—A void order by which it is attempted to set aside an order which is merely interlocutory is not such a final order as will support an appeal.

3. Order of reference—A final order, in cases like this, is such as at once puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.

   In this action to enforce a lien for street improvements, an order of the chancellor referring the case to the city engineer for reapportionment was merely interlocutory. Nevin v. Allen, &c. January 19, 1885. Lou. L. and E. Ct. Opin. by Richards, J., Sup. Ct., dis. Sam'l B. Richardson for appellant; James S. Pirtle and Geo. B. Eastin for appellees.

Forcible Detainer—

1. Proper remedy—The parties in possession of land which had been sold under decree, seeing that the purchaser was entitled to a writ of possession, and that an eviction was inevitable, entered into a writing by which they leased the property from the purchaser.

   Held—That upon the failure of the lessees to restore the possession at the expiration of the lease a warrant of forcible detainer was the proper remedy of the purchaser. Walker, &c. v. Bush. January 8, 1885. Greenup Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Roe & Roe for appellants; B. F. Bennett for appellee.

Fraudulent Conveyances—

1. Intent of grantor—A conveyance by a debtor to one of his creditors can not be set aside as fraudulent merely because the design of the grantor was to prefer the grantee. Beard v. Runyan. January 13, 1885. Metcalfe Cir. Ct. Opin. by Holt, J., Ct. Ap., rev. Garrett & Dehoney and A. Duvall for appellant.

2. Husband and wife—A husband conveyed to appellee a tract of land in order to secure to appellee the purchase money for a tract of land sold by it to this wife. Appellee conveyed both tracts of land to the wife, reserving a lien upon both tracts for the purchase price of the tract sold to her.

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Held—That this was a valuable consideration, making the conveyance from the husband good as against a prior creditor, but the wife can not hold the land as against such a creditor of the husband after appellee's debt is satisfied. Ray, &c. v. Life Association of America. January 17, 1885. Hickman Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Geo. L. Husbands for appellants.

3. Preference no fraud—It may often be meritorious in a debtor to prefer some particular creditor, and his doing so is not fraudulent, but merely a preference, which, by virtue of the statute, may be set aside if attacked within a given time.

4. Deed from father to son in consideration of maintenance—An aged father agreed with his son, one of several children, that if he would stay with him and support him and his wife he would compensate him by paying for a piece of land the son might select. After the son had remained with his father more than a year under the contract the father paid $450 upon a tract of land contracted for by, and conveyed to, the son.

Held—That this conveyance was not fraudulent as to the father's creditors, as, when the money was paid, the father was indebted to the son under their contract to that extent, and hence it was not paid for a future support. It was merely a preference among creditors which did not make it fraudulent. Sweatman v. Spears. January 27, 1885. Johnson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. James E. Stewart for appellant.

5. Deed from mother to daughter—Conveyances from a mother to a daughter and son-in-law are held to be fraudulent, the grantor being indebted at the time in a sum sufficient to swallow up her estate, and the relation of the parties being such that the grantees, who fail to satisfactorily explain how the recited consideration was paid, must have known of the financial embarrassment of the grantor and of the fraudulent design. Caudill v. Goeble, Gd'n, &c. January 29, 1885. Carter Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. E. B. Wilhoit and T. W. Mitchell for appellant; E. F. Dulin for appellee.

Insanity—

1. Definition—In law insanity is a generic term, and embraces every case of defect of reason or weakness of mind which leaves the person without mental capacity to distinguish right from wrong, or without the will power knowing right from wrong, to control a tendency to wrongdoing. To all such cases section 268 of the Criminal Code applies, although the term insanity alone is used. Richey v. Commonwealth. January 15, 1885. Harrison Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Ward & Blanton and Kennedy & Kennedy for appellant; P. W. Hardin for appellee.

Interest—

1. Note and mortgage construed together—Different writings relating to the same subject, executed at the same time and to effectuate the same object, are to be treated as one instrument, and construed together.

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Where a note due twelve months after date provided that it should bear "interest from date, payable semi-annually," and a mortgage executed to secure the note described it as bearing interest until paid, said interest to be paid semi-annually," the contract is construed to be for the payment of interest semi-annually until paid.

2. Payable semi-annually—Parties may lawfully contract for the payment of interest as it accrues, and it may be recovered by an independent action.

3. Taxes—Interest can not be allowed on taxes by way of damages. Shanks, &c. v. Stephens, &c. January 15, 1885. Lou. Ch. Ct. Opin. by Holt, J., Ct. Ap., rev. Rodman & Brown for appellants; Elliott & Hemingray for appellees.

4. On judgment—The judgment of a court fixing the amount of recovery fixes it as of the day the judgment is entered unless another date is fixed.

The Court of Appeals having reversed a judgment for alimony and remanded the cause, with directions to make a smaller allowance, indicating the amount, on the return of the case the plaintiff was entitled to judgment for the amount indicated, with interest only from the date of the judgment therefor, and not with interest from the date of the former judgment. Beall v. Beall. January 12, 1885. Logan Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff., Bowden, J., not sitting. A. G. Rhea for appellant; Browder & Edwards for appellee.

5. Where no interest is claimed in petition—As the petition does not assert any claim to interest already accrued or state any fact from which the court can determine the date from which accrued interest should be paid, interest should be awarded from the date of the filing of the petition. Meek v. Lacy. January 14, 1885. Bath Cir. Ct. Opin. by Richards, J., Sup. Ct., modifying former opinion. R. Gudgell & Son for appellant; B. D. Lacy for appellee.

Judgments—

1. Modification for fraud—Before a party can be allowed to modify a judgment against him for fraud in procuring it he must show, first, that he had a good defense and that he made it, or was prevented from making it by the fraud complained of; or, second, that, having made his defense, he was in some way thrown off his guard as to the preparation of that defense, and thereby deprived of a fair hearing. Howard's Adm'r, &c. v. Howard, &c. January 21, 1885. Estill Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. J. B. White and H. W. Gardner for appellant; H. C. Lilly & Son for appellee.

2. Must describe the land—A judgment for the sale of real estate must describe the property to be sold, and such a judgment can not be rendered where there is no description of the land in the record. McKee v. Sypert. January 28, 1885. Christian Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Petree & Littell for appellant; L. A. Sypert and H. A. Phelps & Son for appellee.

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Judicial Sale—

1. Interest of commissioner in purchase—Where a judicial sale was fair and open to competition, the fact that the commissioner who made the sale afterwards became interested with the purchaser in his purchase does not authorize the chancellor to set aside the sale. Adams v. McClary. January 29, 1885. Rockcastle Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Isaac A. Stewart for appellant; W. O. Bradley and S. M. Burdett for appellee.
2. Defendant dies—Sale confirmed before revivor void—After the death of the defendant and before any revivor was had, an order was made confirming a commissioner's report of sale and directing a conveyance to be made to the purchaser.

   Held—That the order confirming the report of sale having been made after the death of the defendant and before a revivor was void, and no rights were acquired under it. Wheatley v. Hays' Heirs. January 31, 1885. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. James P. Tarvin for appellant; Whitaker & Durrett for appellees.

Gaming—

1. Accomplice—Where two persons play on the premises of another, without his consent, at a game of cards, at which money is bet and won or lost, they are not accomplices, and one of them may be convicted upon the testimony of the other. Cain v. Commonwealth. January 26, 1885. Knox Cr. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Dishman & McElroy for appellant; P. W. Hardin for appellee.

Garnishment—

1. Personal judgment against garnishee—It was error to render judgment by default against appellant, a garnishee, there being no prayer for a personal judgment against it.

A bank being the garnishee, an allegation that the debtor "has on deposit in said bank" a certain sum, with a prayer that this deposit be subjected, was not sufficient to authorize a personal judgment. Owensboro Savings Bank v. Mattingly. January 19, 1885. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Owen & Ellis for appellant; Jolly & Todd for appellee.

Homestead—

1. Leaving State—Abandonment—A debtor who has left Kentucky with his family, and engaged in an extensive business in another State, must be treated as having abandoned his homestead here, although he declares his intention to return. Williams, &c. v. Rose, &c. January 13, 1885. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. H. L. Stone & Wm. H. Winn for appellants; W. H. Holt and C. Brock for appellees.
2. Widow—The widow of the grantor, and not the grantee, is entitled to a homestead in the land. Menifield, &c. v. Menifield's Ass'ee. January 22, 1885. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. G. H. Fulton, E. E. McKay, J. H. Wathen, J. A. Fulton and C. T. Atkinson for appellants; Wm. Johnson for appellee.

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Husband and Wife—

1. Settlement on wife to the prejudice of creditors—Release of dower—A husband sold land in which his wife had a potential right of dower, which she refused to release unless the purchaser would pay her $500 of the purchase money, which was done, and the amount invested by the wife in a homestead. In an action by a creditor of the husband to subject this property of the wife to the payment of a debt to which the property sold by the husband would have been subject, it is held that the creditor is entitled to have the property sold and the proceeds applied to the payment of his debt, after paying to the wife, without interest, the actual value of her potential right of dower in the land originally sold. (Ward v. Crotty, 4 Met., 60.) Jackson v. Potter, &c. January 17, 1885. Warren Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. B. F. Procter and E. W. Hines for appellant; Mitchell & DuBose for appellees.
2. Debt created by husband to improve wife's property—The wife's property may be subjected to the payment of money borrowed by the husband and applied in improving it, although the husband and wife have separated and the property is not more than sufficient to support her and her children. Lennen, &c. v. Fitzpatrick, &c. January 22, 1885. Warren Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. B. F. Procter and E. W. Hines for appellants; James A. Mitchell for appellees.
3. Feme sole—Her liability for his debts—A married woman who has been empowered to trade as a feme sole and her husband are, at law, as much strangers as she and any other person, and she may employ him as her agent in carrying on the business in which she may engage just as she may employ anyone else, and if she furnishes the capital or credit and the business is in fact hers, her property does not become liable to his creditors because she employs him or because the prosperity of her business may be the result of his industry and sagacity; and while she will not be permitted to stand between her husband's creditors and his property, she will not be presumed, more than a stranger, to have aided her husband in an attempt to defraud his creditors. Unz v. Oswald, &c. January 16, 1885. Lou. Ch. Ct. Opin. by Bowden, J., Sup. Ct., aff. Rodman & Brown for appellant; F. Hagan for appellees.
4. Personal judgment against widow—A personal judgment can not be rendered against a widow upon a contract made by her during coverture.
5. Separate estate—The liability of a separate estate is by reason of an express or presumed intent to charge it, and if it is not so liable when the contract is made it can not become so afterward merely because it becomes legally possible that it may be charged.
6. General estate—Where a debt is created by a married woman for necessaries and is evidenced by a writing, signed by her and her husband, the law, independent of the wife's intention, declares her general estate liable for its payment, whether acquired before or after the debt was created.

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7. Necessaries—Where the conversion of the wife's land into money is necessary to her comfort, the services of an attorney employed by her to obtain a decree for the sale of the land should be considered as necessaries within the meaning of the statute, and the fact that the husband was a lawyer, and capable of doing all that was necessary to be done, does not alter the case.
8. Wife's contract—Where the wife's contract was for necessaries she is so far relieved from the disabilities of coverture as to preclude her from making any question whether the thing delivered and done was fairly worth the amount evidenced by the writing, but she can rely on any defense available to a person not under disability, such as a total or partial failure of consideration. McKee v. Sypert. January 28, 1885. Christian Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Petree & Littell for appellant; L. A. Sypert and H. A. Phelps & Son for appellee.

Land—

1. Standing trees on land sold—Where land is sold and conveyed, the standing trees pass with it as a part of it unless there has been an anticipated severance operating as a constructive delivery, of which the purchaser has notice. Lawson, &c. v. Smith. January 7, 1885. Boyd Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. K. F. Prichard for appellants; R. T. Burns and L. T. Moore for appellee.

Landlord and Tenant—

1. Joint owners of land—Contract between held a lease—Plaintiff and defendant owning jointly a tract of land agreed that defendant should have the use of it in consideration of his paying the taxes and making repairs, Held—On his failure to do this, plaintiff could not repudiate the contract and recover a reasonable rental, but the contract was a lease, for breach of which plaintiff might, as landlord, recover of defendant, as tenant, the amount of the tax and value of repairs. Huffman v. Pollard. January 12, 1885. Garrard Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Burdett & Walton for appellant; Denny & Tomlinson for appellee.
2. Subletting—A tenant who has a term for less than two years, by subletting merely assumes the risk of being ousted if his landlord refuses to acquiesce in the contract, and does not thereby convert himself into a trespasser, or an insurer against loss by fire. Hundley v. Moore. January 12, 1885. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. W. C. & C. C. McChord for appellant; John W. Lewis for appellee.

Limitation, Statute of—

1. Actions by Commonwealth—The statute of limitation applies as well to an action by the Commonwealth as to an action by one of its citizens, except where a different time is prescribed.

   To an action by the Commonwealth against the city of Lexington to recover the amount of certain fines and forfeitures collected by the city

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on judgments rendered by its courts for violations of the penal laws of which those courts had jurisdiction, the five years' statute of limitation applies except as to such sums as were collected within five years next preceding the institution of the action. Commonwealth v. City of Lexington. January 17, 1885. Fayette Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. on original and rev. on cross appeal. Hallam & Myers and J. H. Beauchamp for appellant.

2. Abandonment of contract—At a sale of the State's interest in a turnpike in the year 1871, T. became the purchaser and executed his bond for the purchase price. In 1872 the act authorizing the sale of the stock was repealed and T. abandoned his purchase and his bond was surrendered to him, although he might have enforced the contract had he chosen to do so. From that time until 1880, when this suit was brought by appellee claiming to be interested with T. in the purchase and seeking an enforcement of the contract, no demand was made of the stock and nothing transpired between the parties. The State regarded T. as the principal in the purchase, and at no time was informed that the purchase was made for others.

   Held—That after the lapse of eight years, when the dividends from the road have paid off more than half the purchase price, strangers to the contract, so far as the State is concerned, who have never parted with their money, ought not to be allowed to enforce it.

3. Defense to—The plea of the statute of limitations can not be defeated, for no other reason than that the plaintiff supposed if he sued he could not recover. Commissioners of Sinking Fund v. McDowell, &c. Filed January 20, 1885. Franklin Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. P. W. Hardin for appellant; D. W. Lindsey for appellees.

"Local Option"—

1. Repeal of statute—By virtue of an express statute in Kentucky, a law that has been repealed is still effective for the purpose of punishing any violations thereof.
2. Sale of liquor by druggist—Prior to the act of May 8, 1884, a druggist, without a license therefor, was not permitted to retail spirituous liquors except upon a physician's prescription. Commonwealth v. Reynolds. January 16, 1885. Boyle Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. P. W. Hardin and R. C. Warren for appellant; J. B. McFerran for appellee.
3. Averments of indictment—An indictment under the act commonly known as the "local option" law should allege facts showing that the act was in force at the time of the sale in the particular district or town where the selling is alleged to have occurred. The allegation that "said town had previous to said sale in legal form adopted the act," and that "it was then in force," is a conclusion of law. Commonwealth v. Myrick. January 12, 1885. Carroll Cir. Ct. Opin. by Bowden, J., Sup. C., aff. P. W. Hardin for appellant; H. M. Fisher and G. W. Montfort for appellee.

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Lunatics—

1. No one can sue for lunatic except his trustee—The trustee of a lunatic having sold land belonging to the lunatic and appropriated the proceeds, a creditor of the lunatic sued his sureties to recover the money, making the lunatic a plaintiff. A successor to the defaulting trustee having been appointed, he sued to set aside the sale as fraudulent. Held—He and not the creditor had the right to choose the remedy, and the former could not continue the suit to recover the purchase money, but might, on petition, be made a party to the trustee's suit, or consolidate his suit with the trustee's at his own cost. Trunk's Committee v. Eastern Ky. Lunatic Asylum, &c. January 10, 1885. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. Rodman & Brown, A. P. Humphrey and John S. Kline for appellant; James G. Givens and J. F. Bullitt, jr., for appellees.

Mandamus—

1. School trustee—Mandamus lies to require the chairman of board of trustees of a common school to report to the commissioner of the county a common school taught under an employment by the board. The remedy by mandamus is not excluded by section 16, article 7, chapter 18, General Statutes. Jones, &c. v. Strange. January 19, 1885. Cumberland Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. H. C. Sandidge for appellants; Walker & McMurtry for appellee.

Obstructing Public Road—

1. Allegations of indictment for—An indictment for obstructing a public road should charge that there was a public road and describe the act or acts complained of specifically enough to enable the court to determine whether or not they amounted to an obstruction. Commonwealth v. Chattanooga Railway Co. January 23, 1885. Lawrence Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. P. W. Hardin for appellant.

Partnerships—

1. Rights of partners—A father who had been conducting a prosperous business in his own name, his sons working for him on a salary, added to the business name of the concern the words "and sons," and under the altered name suits were instituted, accounts made out, receipts executed, and in fact all the business of the concern conducted; the sons were not, as theretofore, credited by any amount as salary, but each was simply charged with what he took from the firm business, and the father stated to outsiders that his sons were partners with him in the business. In a contest between the father and sons, it is held that the sons are entitled to share in the profits, after paying to the father interest upon his capital invested. That there were no definite terms as to the interest of each in the partnership, or as to its duration, is not sufficient to recover, the testimony sustaining the claim of the sons. Reed v. Reed, &c. January 15, 1885. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. M. J. Dudley for appellant; W. Lindsay and Tisdale & Theissen for appellees.

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Pleading—

1. Character of relief—Appellee, by his original petition, sought to recover a tract of land, and by an amended petition that he had sold the land to the ancestor of the defendants by parol, and had received a part of the purchase money. The defendants denied the parol sale, and alleged that their ancestor owned the land and invested the appellee with title to sell for him. The proof established the parol sale and the payment of part of the purchase money. Held—That the lower court erred in giving judgment for the land itself, as the only relief sought by the amended petition was the enforcement of the plaintiff's lien, for which judgment should have been rendered. Ward, &c. v. Ward, &c. January 8, 1885. Martin Cir. Ct. Opinion by Pryor, J., Ct. Ap., rev. Stewart & Stewart for appellants; T. T. Mann for appellees.
2. Suing corporation—The Kentucky Central Railroad Co. having been summoned to answer a petition which alleged that the "K. C. R. Rail Co." committed the wrongs complained of, it demurred to the petition. Held—The demurrer should have been sustained, there being no averment that either the Kentucky Central Railroad Co. or the K. C. R. Rail Co. is incorporated, or that they are the same companies. Prewitt v. Ky. Central R. R. Co. January 9, 1885. Rockcastle Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. A. Stuart for appellant; Burdett & Brown for appellee.
3. Failure to deny immaterial allegation—The failure of a party to deny an allegation which, so far as the pleadings disclose, is altogether immaterial, does not authorize the court to take the allegations as true. Citizens Savings Bank v. Miller, Cessna & Co. January 9, 1885. Elliott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. E. F. Dulin for appellant; Z. T. Young and M. M. Redwine for appellee.
4. Allegation of—Performance of condition—In an action upon a bond by which the obligors undertook to pay a certain sum, if it should be adjudged that a crop of tobacco levied upon under a distress warrant was subject to the warrant, there being no averment in the petition that it had been adjudged that said tobacco was subject to the warrant, there was a failure to aver that the condition of the bond had been performed. An allegation that the tobacco was subject to the distress warrant was not sufficient. Hickman v. Bradford. January 19, 1885. Pendleton Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Clark & Applegate for appellant; C. H. Lee and John H. Fryer for appellee.
5. Suit on account—Necessary allegations—While the law implies a promise to pay for goods purchased and money borrowed it does not imply a promise to pay any amount certain; it is, therefore, necessary, in an action upon an account for goods sold and delivered and money loaned, to supplement this implication by allegations of values and amounts. Pelly's Adm'r v. Rigney. January 21, 1885. Casey Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Adams, Clark & Belden for appellant; Hill & Alcorn for appellee.

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Practice in Civil Cases—

1. Dismissing petition pending reference—No question as to the sufficiency of the petition having ever been submitted to the court, or even raised upon the record, it was error to dismiss the petition pending a motion for a reference to the master commissioner, the action being for the settlement of a decedent's estate. Courts' Adm'r v. Courts, &c. January 12, 1885. Bracken Ch. Ct. Opinion by Richards, J., Sup. Ct., rev. W. V. Welden and R. K. Smith for appellant.
2. Continuance after submission—After this case had been prepared by appellants and submitted for trial it was not an abuse of discretion on the part of the judge to refuse a continuance that an amended petition might be filed and further proof taken in support of appellant's claim.
3. Judgment filed in vacation—Overruling motion to set aside—The special judge, at the instance of appellant, withheld his judgment at the regular term and filed it with the clerk in vacation. When the next regular term began the special judge, who had been elected as judge of the district, overruled a motion to set aside the judgment.

   Held—That this made it the judgment of the court, even if the objection as to its delivery to the clerk after term time is to be considered. Taylor, &c. v. Berry, &c. January 31, 1885. Livingston Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. D. H. French and A. Duvall for appellants; Hendricks & Bush, W. C. Trabue and J. W. Bush for appellees.

Practice in Criminal Cases—

1. Evidence for jury to weigh—The court may reverse when there is no competent evidence tending to establish guilt, but where there is such evidence, although entirely circumstantial, it is for the jury to weigh and determine whether it justifies a conclusion of guilt.
2. Reversible error—The misconduct of the jury first made to appear on a motion for a new trial is not a matter for review upon appeal. Peters v. Commonwealth. January 22, 1885. Clay Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. G. W. Baker for appellant; P. W. Hardin for appellee.

Process—

1. Proof of service—A summons having been lost, the clerk's entry on the docket of the return which he testifies that he copied from the return on the summons, taken in connection with the recital of the judgment that the defendant was served with process, is held to be entitled to more weight than the recollection of the defendant and the deputy sheriff, by whom it appears from the clerk's entry the summons was served. Lemming v. Mullins. January 17, 1885. Pendleton Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Clarke & Applegate for appellant; John H. Fryer for appellee.

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Recognizances—

1. Recognizances taken by the circuit court for the appearance of a defendant to answer an indictment are valid, although not expressly authorized by the Code.
2. Presumptions—Continuance—Such a recognizance conditioned to be void if the defendant shall appear on the first day of the next term "to answer" the indictment, "not departing without leave of court," does not bind the recognizors for the appearance of the defendant after the term specified; and where a forfeiture is taken at a subsequent term, and it appears that at the time fixed in the recognizance for the appearance of the defendant there was a general order of continuance, the court will not presume that the defendant did not then appear, but will rather presume that he either appeared, or was ready to appear. Ramey, &c. v. Commonwealth. January 26, 1885. Pike Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Ward, P. J., dissenting.

Sales of Personal Property—

1. What a sufficient delivery—An Ohio firm owning staves in Kentucky, in the possession of an agent, sold them to appellant. The agent having received from appellant an order from the firm to turn over to it the staves in his custody, furnished the bank a list of the staves which were piled up at different places, some in the woods, and then became its agent to retain charge of them for it. Held—That this was a sufficient delivery of the staves to vest the title in appellant as against a creditor claiming under a subsequent attachment, and that it was not necessary to remove the staves from the places where they were, there being on such visible possession by the nonresident vendor as could possibly indicate an existing or continued right in him. Citizens Savings Bank v. Miller, Cessna & Co. January 9, 1885. Elliott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. E. F. Dulin for appellant; Z. T. Young and M. M. Redwine for appellees.

Sheriff—

1. Authority to collect fines—The sheriff has no authority to receive payment of a judgment in favor of the Commonwealth for a fine except on process. Commonwealth v. Shanks. January 12, 1885. Jeff. Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Helm & Bruce and A. G. Caruth for appellant; Zach Phelps for appellee.
2. Acting as administrator—Liability of deputy—While a sheriff acting as administrator under an order of a county court can not relieve himself of his trust by delegating his authority to another, yet he is entitled to the services of his deputies in discharging the duties imposed; but a deputy who thus acts under the direction of his principal can not be held liable for the balance shown to be due the estate upon a settlement not made by him, the money not being in his possession. Mason, &c. v.

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Beaseman. January 26, 1885. Harrison Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Swinford & Lafferty for appellants; L. M. Martin for appellee.

Special Judge—

1. Where a special judge is elected by the attorneys to hold court during the absence of the circuit judge, his acts as an officer de facto are valid as to third persons, although he resides out of the district. Eversole, &c. v. Steele. January 21, 1885. Owsley Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. John L. Scott and H. C. Eversole for appellants; D. W. Lindsey and J. M. Beatty for appellee.

Sureties—

1. Failure of creditor to prove claim against deceased principal—A surety upon a promissory note is not released by the failure of the creditor to present his claim, properly proved, against the estate of the deceased principal or co-surety within one year after the administrator of the decedent has qualified, although by such failure the estate of the decedent is released from interest after his death, and the surety thereby deprived to that extent of his recourse against the principal or co-surety. The mere delay of the creditor to proceed against the principal does not release the surety, whose duty it is, by the very terms of his contract, to see that the debt is paid at maturity. Brown, &c. v. Witherspoon, &c. January 23, 1885. Mercer Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. P. B. Thompson, jr., and Bell & Wilson for appellants; P. B. Thompson, sr., for appellees.

Taxes—

1. Paid by mortgagee—Lien for—Although the payment by the mortgagee of taxes upon the mortgaged property inured to the benefit of all who were interested in the property, he is not entitled to a superior lien for the amount so paid, as he does not allege facts showing that the steps necessary to the existence of a tax-lien had been taken, and, moreover, had accepted the mortgagor's note for what he had so paid, thus placing the claim upon the footing of an ordinary debt.
2. Pleading—Necessary averments—In a proceeding to subject property to the payment of taxes it is necessary to state the facts affirmatively, showing that every step has been taken which was necessary to create the lien, and the failure to make such allegations presents a case where no cause of action is stated, and not merely one defectively stated. Shanks, &c. v. Stephens, &c. January 15, 1885. Lou. Ch. Ct. Opin. by Holt, J., Ct. Ap., rev. Redman & Brown for appellants; Elliott & Hemingray for appellees.

Usury—

1. Device to cover up—An agreement by the borrower of money from a charitable fund to make a certain annual "donation" to the fund in addition to the legal rate of interest contracted to be paid is held to be a device to cover up the payment of usury.

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2. Plea not personal—The plea of usury is not a personal one to the debtor, but may be relied upon by one holding a junior lien upon property mortgaged to secure the debt, the property being insufficient to pay the liens upon it. Shanks, &c. v. Stephens, &c. January 15, 1885. Lou. Ch. Ct. Opin. by Holt, J., Ct. Ap., rev. Rodman & Brown for appellants; Elliott & Hemingray for appellees.

Vendor and Vendee—

1. Mistake in deed—Where by mistake a vendor included in the boundary conveyed to his vendee land belonging to another, which constituted no part of the consideration for the purchase price, the vendee was not entitled to judgment for the value of the land so conveyed. Hamilton v. Grigsby, &c. January 8, 1885. Nelson Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. J. D. Wickliffe for appellant; Wm. Johnson and W. R. Grigsby for appellees.
2. Note payable on condition—Assignee—A vendee provided in the note executed by him for purchase money that it was not to be paid until the property was acquitted of all claim thereto made by a certain party, who in fact had no claim to the property, but held a debt against the vendor, from which the vendee apprehended danger. Held—The condition was binding on an assignee of the note, and he could not enforce payment of it by the vendee until he had satisfied the claim against the vendor. Nickles v. Mercke, Ex'or, &c. January 12, 1885. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. P. A. Gaertner for appellant; R. C. Davis and Matt O'Doherty for appellees.
3. Deficit in land—Limitation—In a suit by a vendor to recover purchase money lapse of time is no bar to the defense that there was a deficit in the land. Highbough v. Hubbard. January 14, 1885. Larue Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. A. B. Montgomery for appellant; W. P. D. Bush and Finlay F. Bush for appellee.

Wills—

1. Contract to make devise—A mere declaration by one that he intends to dispose of his estate by devise to a particular person, by reason of a consideration received, is not sufficient to create an equity or a contract which would authorize the chancellor to compel compensation by reason of the failure of the decedent to comply with his promise. To have such an effect the contract or agreement must be clearly established. Hinton v. Gano's Heirs. January 8, 1885. Scott Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., aff. W. S. Darnaby and W. Lindsay for appellant; Alvin Duvall and G. S. Wall for appellees.

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EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
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CURRENT TOPICS.

It was Lord Chesterfield who thought of writing a book on the art of argumentation and having for a motto "quidlibet ex quolibet"—the art of proving anything from anything—and he said he could, with a little ingenuity and labor, construct a very plausible argument to prove that highway robbery was not immoral. This is rather belittling to the particular art in which lawyers are supposed to excel. If it can thus be employed at will to uphold the cause of error and falsehood, it can not be a safe guide for reaching truth. There is no doubt, however, that argument from counsel representing both sides of a case is useful in enabling the court to reach a just conclusion, but it is also true that argument is much abused as some lawyers think they have a right to be heard at length upon any point they may choose to press in a case, and that a court ought to listen patiently and not decide till they have been heard to the end, otherwise they complain of oppression, tyranny and arbitrary rulings. We think the court has a right to restrain argument, and let it be known when the mind of the judge is made up on a particular proposition and when he is in doubt. He is not bound to surrender himself as a passive listener to whatever propositions counsel may see fit to argue. We have a case in mind where the maker of a note,

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endorsed to and discounted by a bank, being sued on it by the bank, set up as a defense that the consideration which had passed between him and the assignor of the note had failed, and his counsel insisted upon arguing the proposition and showing to his honor that his client would be bankrupt if he had to pay the note, and, therefore, he ought, on general equitable principles, to be relieved against the hardship. We do not doubt that any judge who is impartial as between the litigants and has the ordinary qualifications for his position is capable of regulating the discussion without in the least being arbitrary or infringing on the fair use of argument as an aid in ascertaining the truth. The stationary courts, those which are held in the large cities and which sit the whole year round, can afford to be more indulgent in this matter than the others like the State, Circuit and Federal Courts, which administer justice on the wing, having various places in the district to go to, and can, therefore, allot only a limited time to each; but the fact that the decisions of the latter class are as correct, upon the whole, as those of the former shows that substantial justice loses nothing by curtailing and directing argument.

Judge Harlan has recently rendered a very able dissenting opinion in an interesting case, Elk v. Wilkins, lately decided by the U. S. Sup. Ct., which involves the right of Indians to become citizens of the United States. The plaintiff was born in the Indian Territory, a member of one of the wild tribes there, but he separated from the tribe, came into Nebraska, where he settled permanently, and after having resided there long enough to entitle him to vote, he tendered his ballot at an election, but the clerk refused to receive it, whereupon he brought this action in the U. S. Circuit Court, claiming that the right guaranteed by the fourteenth and fifteenth amendments had been denied him.

The court (by Gray, J.,) holds that an Indian who abandons his tribe and takes up his residence in a State is not a citizen nor entitled to vote until he has been naturalized. Be-

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cause (1) those only are citizens by birth who are born in the United States and subject to the jurisdiction thereof. The Indians, though born within the geographical limits of the United States, are not subject to its jurisdiction in the full sense of the term. And (2) Indians are aliens. They live on reservations set apart for them, where they are not subject to the laws of any State or the United States. The nation deals with them through treaties and legislative acts, expressly applicable to them, as it does with foreign powers. They owe qualified allegiance only to the United States. Their primary allegiance is due to the head of their tribe. Therefore, they must go through the process required of other aliens—naturalization—before they become citizens.

But Judge Harlan (Judge Woods concurring) insists that the act of 1866 which defines and enumerates those who are citizens, "all persons born in the United States and not subject to any foreign powers, excluding Indians not taxed," are citizens, shows that the criterion for Indian citizenship is not naturalization, but payment or liability to pay taxes, and as the allegations of the pleadings show that plaintiff is a resident of the State, and is, therefore, liable to be taxed, he is a citizen, and entitled to vote. The objection that the Indian is not born subject to the jurisdiction of the United States is also answered by the verbiage of the act of 1866. It provides, first, that "all persons born in the United States, and not subject to any foreign powers," and then adds, "excluding Indians not taxed," are citizens. If Indians generally were not regarded as embraced by this first clause and described by its terms, why introduce after it a clause excepting a particular class of Indians—those not taxed? It is plain that (excluding the excepted class) the act regards Indians as born in the United States and not subject to any foreign power—i. e., as subject to the United States, and, therefore, as citizens.

We think that Judge Harlan's position is the better of the two, since it rests on the language of a statute expressly regulating the subject and defining who are citizens, rather than on the general theories of the court that an Indian is an alien, which they admit is true in a qualified sense only.

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There is quite an interesting discussion going on just now in some of the law periodicals as to how far the study of Latin is necessary to secure a power of clear expression. We do not believe there is any substitute for Latin in a college curriculum, not merely because it develops a power of clear expression, but many other powers at the same time. It disciplines the mind, teaches habits of accurate discrimination, of close attention, besides bringing the boy in contact with the vigorous and noble ideas and sentiments of the classic texts. But, so far as mere power of expression is concerned, we believe that anyone who has that one end in view can as well secure it from a study of Addison, Swift or many other English models, as from Cicero or Tacitus.

In reading Latin the benefit comes in this way: The idea is furnished by the author and the reader is required to find for himself the most accurate and becoming dress for it in English. Practice in this exercise makes him more or less proficient in the art of expression. But he can go through the identical exercise by reading a paper of Swift or Addison, getting possession of the idea and then putting it into words, trying to come close to the original. By the latter process one has this advantage, that years need not be consumed in preliminary study of grammar and syntax, and he is brought from the start face to face with his immediate object. Many are inclined to dismiss the subject with the statement that clear expression depends after all primarily on clear thinking, and that there is no better training for the latter than the study of logic. But it can not be denied that the art of expression must be separately cultivated, not every man who is a vigorous thinker is a clear writer or speaker. Emerson and Bishop Butler are instances in point, and both lose much force in consequence of their obscure styles.

Speaking of the recent sentence of death passed on Dudley and Stephens (the men who, being shipwrecked and cast out at set in an open boat, killed one of their comrades and ate him

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in order to save their own lives) the London Law Times says:

Illogical Compromises—The commutation of the sentences passed on Dudley and Stephens marks one of those illogical compromises which seem to be of the essence of English procedure, whether legal or political. The inconsistency of sentencing a man to death with solemn formality on Monday, and mitigating the sentence to a brief term of the mildest form of imprisonment on Saturday, has naturally provoked a good deal of more or less intelligent criticism, and is certainly a proceeding not altogether calcuated to exhibit the law in a dignified light. What is the use, it is very naturally asked, of ostentatiously asserting the superiority of the law to all considerations of pity or sentiment, where there is another power behind, waiting to override the law and to give effect to the very plea the law rejects?

We do not agree to this. The sentence complained of establishes that the law regards human life as most sacred, and does not recognize the necessity of preserving one's own as any justification for destroying the life of another innocent and unoffending person. The principle raises an additional safeguard to the right of self-existence, and gives us to understand that if we take life we do so at our peril; that we are in the eye of the law murderers, and shall suffer sentence as such. That statement of the facts, with our own plea of necessity thrown in, will conclusively establish our guilt, and we shall receive sentence accordingly, and must then assume the burden of bringing ourselves in reach of executive clemency and the bounds of mercy, though we have no standing in a court of justice.

KENTUCKY COURT OF APPEALS.

PAUL, &c. v. SMITH, &c.

(Filed January 31, 1885.)

1. Judgment—Collaterally attacking—Where a judgment is collaterally offered in evidence in another suit its validity can not be questioned except for want of jurisdiction in the court that rendered it.

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2. Attachment—Defective petition—Voidable judgment—Title of purchaser good—Though the statements of the petition on which an attachment was issued were technically defective, yet as process was duly served (by warning order, defendant being a nonresident) and the writ properly levied, the court had jurisdiction and its judgment was not void but voidable, and the purchaser at the attachment sale acquired good title. (Hines, C. J., dissenting, Pryor, J., not sitting.)

Appeal from Henry Circuit Court.

Opinion of the court by Judge Holt.

The defense of the appellees to this action of ejectment by the appellants as the heirs of F. H. Paul is that the land was attached for his debts, and purchased by the party through whom they claim title at a decretal sale; and it being assailed collaterally, the only question to be determined is whether it was void.

By section 2 of an act of the Legislature of Kentucky, passed December 23, 1861, and entitled "An act to amend the Code of Practice in civil cases," an additional ground of attachment was provided, in these words: "That he or they have voluntarily left the county of his or their residence; have been absent therefrom for thirty days, and during said period of time have been, and continued voluntarily, within the so-called Confederate States, or their military lines." (Myers' Supplement, page 88.)

On January 4, 1862, A. P. and William Hughes brought each an action for debt in the Henry Circuit Court against F. H. Paul, and on February 1, 1862, F. H. Babbitt did the same. Attachments were sued out in each case upon the ground above stated, and levied upon the land in contest; also a warning order was made in each case, and a report filed by the duly appointed corresponding attorney.

Proper attachment bonds were executed, as well as the required bonds to the nonresident defendant; and the actions after consideration having proceeded to a judgment, the attached property was sold thereunder and purchased by the two plaintiffs, the Hughes, and then by their order conveyed by the court's commissioner to their sister, who was the wife of

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W. H. Paul, and the mother of the appellants, and through whom the appellees claim title.

The success or defeat of the appellants in this action depends upon whether the Henry Circuit Court had jurisdiction to render said judgment; because it may now be regarded as a legal maxim that when a judgment is offered in evidence collaterally in another suit, its validity can not be questioned except for want of jurisdiction in the court that rendered it.

In the two suits first above named the ground for the attachment was thus stated: "Said F. H. Paul has voluntarily left the county of his residence; has been absent therefrom for thirty days, and during said period of time has been, and continued voluntarily, within the so-called Confederate States or their military lines;" while in the Babbitt case it is as follows: "Said F. H. Paul has voluntarily left Henry county and State aforesaid, the county of his residence; has been absent therefrom for thirty days; and during that period of time has been and continued in the so-called Confederate States or their military lines."

It is urged that the jurisdiction of the court depended upon the grounds for the attachments being properly stated; and that in the first-named two cases it was not alleged that the defendant, F. H. Paul, was, when he left the county of his residence, a resident of Kentucky; while in the last one the word "voluntarily," as used in the statute, was omitted from the statement relating to the defendant having remained within the Confederate States or their military lines.

This court has heretofore held said statute to be valid, and it was of course intended to relate only to residents of Kentucky; but its language was used in setting forth the ground of attachment in the two first-named cases, and it is said in Drake on Attachment, section 98, that no more is required.

A substantial compliance is certainly sufficient. If by fair inference the scope and sense of the law have been fulfilled, a technical objection, which does not reach to the substance, will not avail, even if a statute in derogation of the common law be in question.

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Where a statute authorized an attachment upon the ground that the defendant "resides out of the State," an affidavit stating that "he is a nonresident" was held sufficient, although it failed to state whether the alleged nonresidence related to the county, district or State. In this instance the action was brought in this State, and under a statute which related to residents of this State alone; the petition alleged that the defendant had "voluntarily left the county of his residence;" and this, upon such a state of facts, should, in our opinion, be held to mean that he had left the county of his residence in Kentucky; and we are, therefore, of the opinion that the ground of attachment in said two cases was sufficiently stated.

But granting that the omissions in stating the grounds of attachment were irregularities of such a character that they would have authorized a reversal of the judgment upon a direct appeal from it, yet did they render it void, so that it can be questioned collaterally; or, more broadly stated, did the jurisdiction of the court depend upon the sufficiency of the statement of the grounds of atatchment, or was it acquired by the constructive service of the summons upon the defendant by means of the warning order and the levy of the attachment upon the property, and the return thereof?

The work above cited of Mr. Drake seems to hold that the proper statement of the grounds of attachment confer it, but he bases his opinion mainly upon some Tennessee and New York cases; and upon an examination of the latter we find that they arose under a statute by which the attachment was the original process; that the affidavit upon which it issued was not amendable; and that it was issued by a mere officer out of court, whose power was limited, and derived solely from the statute.

In such a case the sufficiency of the affidavit might well be held to be a jurisdictional question. Under the present Code of New York, however, the attachment is, as under our practice, a mere provisional remedy, and not the commencement of the action; and it has been repeatedly decided by the courts of that State, since the adoption of its Code, that the jurisdic-

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tion does not depend upon the proper statement of the grounds of attachment. (In the matter of Griswold, 18 Barb., 412; Thompson on Prov. Remedies, page 379.)

By section 39 of our Civil Code an action is commenced by filing a petition and causing a summons to be issued or a warning order to be made, and when once properly commenced the jurisdiction of the court to proceed is acquired; and it is difficult to see why the statement of the grounds for a mere provisional remedy should control the jurisdiction, when the granting and issual of an attachment and its levy merely would not authorize the court to proceed and render a judgment.

The jurisdiction of the person arises from the actual or constructive service of process; while the writ of attachment draws the property within the court's power; and a lien is created upon the property of one constructively summoned by the levy of the attachment. (Myers' Code, section 449; act of December 23, 1861; section 13, Myers' Sup., page 38.)

In Cooper v. Reynolds, 10 Wall., 308, the Supreme Court of the United States, in a case arising under the laws of Tennessee, held that a defective affidavit for an attachment might be ground for a reversal of the judgment, but did not render it void; and the decisions of this court are in accord with this doctrine.

In the case of Allen v. Brown, 4 Met., 342, the court uses this language:

"The Code does not declare that the clerk's order of attachment shall be void unless the requisite affidavit is filed, nor that the jurisdiction of the court is to depend on the filing of such affidavit. The case seems to be within the general rule, that the proceedings of a court having jurisdiction of the person or subject are not void, however erroneous they may be.

The jurisdiction of the court in attachment cases depends upon the actual or constructive service of process upon the defendant, and not upon the plaintiff's affidavit, nor upon the clerk's order."

In the last-named case the affidavit for the attachment was defective in not stating that the claim was just; and it is claimed by counsel that the point, as to which the above lan-

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guage is decisive, was not presented; but the judgment of the lower court had to be reversed, and the question was raised whether upon the return of the cause the affidavit could be amended; and after stating that if the attachment were void by reason of the defective affidavit an amendment could not aid it, the court properly considered the question whether it was void or merely erroneous, and in doing so used the language supra.

In the case of Bailey v. Beadles & Bolinger, 7 Bush, 383, there was a like defect in the affidavit as in the last-named case; and the court decided that it was indispensably necessary that an attaching plaintiff should state that his claim is just, and that the failure to do so was an irregularity warranting a reversal upon an appeal, but that it did not render the order of attachment or the judgment void.

A distinction is attempted to be drawn between the necessity for stating a ground for an attachment, and, as counsel term it, an affidavit for obtaining it, as that the claim is just, etc. We are unable, however, to perceive the force of it, as to the question now presented. The same code of practice that requires the ground of attachment to be stated is equally as imperative in requiring that the plaintiff shall state that his demand is just; and it is said in Drake on Attachment, section 95, that the failure to make the latter statement is just as fatal to the attachment as a failure to properly allege the ground of attachment.

In the case of Bailey v. Beadles & Bolinger, supra, the land attached had been ordered to be sold, and it was claimed that by reason of the defect in the affidavit the order of attachment was void, and that the court had no jurisdiction to render a judgment either in personam or in rem; and in deciding this question, thus directly presented, the court not only cited with approval the case of Allen v. Brown, but quoted from it as supra, showing that it did not regard that part of the opinion as dicta.

In Thomas v. Mahone, 9 Bush, 111, it is said: "The jurisdiction is acquired thirty days after the order of warning is made. It is at that time that the defendant is deemed to be

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constructively summoned. (Section 91, Civil Code). The local jurisdiction of the court over the thing sought to be sold, and the jurisdiction acquired over the person of the defendant by the constructive service of process provided by law, authorizes the court to proceed, and although the failure to appoint the attorney or to take the bond required by section 440 are reversible errors, the jurisdiction being complete, the judgment will not be void."

Again, in the case of Burchett, &c. v. Burchett, 5 Ky. Law Rep., 314, this court held that in an attachment case the jurisdiction of the court depends upon the actual or constructive service of process, and not upon the plaintiff's affidavit or the clerk's order.

There is no decision of this court in conflict with the rule laid down in the above cases.

In Bell, Berkley & Co. v. Hall's Ex'ors, 2 Duvall, 288, it was held as to three of the cases (consolidated) that the attachments were "unauthorized" because it was not alleged that the defendant had voluntarily left the county of his residence; but in these cases the attaching creditors were at war among themselves as to the priority of the attachments in the original suits, and the question of their validity, or the sale under them, did not arise collaterally.

In the case now under consideration the provisions of the Code of Practice as to constructive service were fully complied with; and it was because this had not been done that this court, in Brownfield, &c. v. Dyer, &c., 7 Bush, 506, held that the judgment then in question was void for want of jurisdiction.

In Grigsby, &c. v. Barr, &c., 14 Bush, 330, no attachment had ever been issued, and the sale of land that had been made was held to be void because the court had never obtained any power over it.

It would be unreasonable to require a purchaser at a judicial sale to examine the entire record upon which it is based in order to detect irregularities of procedure. It is true that the sale of the property of a nonresident under attachment is in

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derogation of the common law; that it involves the exercise of extraordinary power, and hence it should appear that the proceeding was coram judice; but to prevent the unsettling of titles and technical objections from overriding principles at the expense of justice, courts should incline favorably to judicial sales.

In this instance the property was purchased by the brothers-in-law of F. H. Paul; they conveyed it to Mrs. Paul; she sold it for $5,000, and presumably the appellants shared the benefit with her. Innocent purchasers had held it undisturbed for sixteen years before this suit was brought, and during that time, as the various conveyances show, they have greatly improved it, and equity, as well as the rules of law, forbid that they should now be deprived of it.

Judgment affirmed.

Judge Pryor not sitting.

Chief Justice Hines dissenting.

Chief Justice Hines delivered the following dissenting opinion:

On the 23d of December, 1861, the legislature of this State passed an act, entitled "An act to amend the Code of Practice in civil cases," which is as follows:

"Section 1. That in addition to the grounds for attachment in the Code of Practice in civil cases there shall be the following: That the defendant or defendants, or some of them, are in the service of the army of the so-called Confederate States of America, or any military body of men co-operating with said army.

"Section 2. That he or they have voluntarily left the county of his or their residence; have been absent therefrom thirty days, and during said period of time have been, and continued voluntarily, with the so-called Confederate States or their military lines.

"Section 3. That he or they have voluntarily left the county of his or their residence, for the purpose of joining the army of said Confederate States, or any military body of men co-operating with said army, or for the purpose of entering the service, either civil or military, of said Confederate States,

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and leaving for such purposes, or either of them, have remained absent from such county, so that the ordinary process of law could not be served upon them for thirty days, and continued so absent."

The fourth section provides that any of these grounds "shall be sufficient to authorize and sustain the actions and attachments by creditors under section 259 of Civil Code."

The act also provides for a warning order and that the attachment may be granted by the judge of any circuit or county court, or by the clerk of the court or justice of the peace, from whose office such attachment may issue.

The twelfth section of the act provides that the section quoted shall not apply to any person so within the Confederate lines by direction of the United States or the State of Kentucky.

The only question presented on this appeal is the construction of this act. Appellants, as the children and heirs of F. H. Paul, sued, as in ejectment, to recover a certain portion of real estate in the possession of appellees. Appellees answer and set up title by purchase under a decree rendered in the circuit court of the county in which the land lies, and in which this action was instituted, and exhibit, as the foundation of their title, a copy of the proceedings that resulted in the decree.

If the court under whose decree appellees claim had jurisdiction to hear and determine the cause any irregularity in the proceedings was subject to review only on appeal, but if the court had no jurisdiction the decree of sale was void, and appellees can claim no title under it. In the first instance the irregularity could be reached only by appeal; in the second the whole proceedings may be disregarded and treated as a nullity, as is here attempted.

The history of the proceedings through which appellees claim title is as follows:

A. P. and William Hughes, in January, 1862, instituted separate actions on promissory notes alleged to be due and unpaid, and in the petition in each case allege that "said F. H. Paul has voluntarily left the county of his residence; has been absent therefrom thirty days, and during said period of time has

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been, and continues voluntarily, within the so-called Confederate States or their military lines." Following this is a prayer for judgment and for general attachment against the property of the defendant and for all proper relief.

Subsequently one Babbitt instituted in the same court an action, seeking the same relief, on an account in which he alleges: "That the said F. H. Paul has voluntarily left Henry county and State aforesaid—the county of his residence; has been absent therefrom for thirty days, and during that period of time has been and continues in the so-called Confederate States or their military lines."

These cases were consolidated, and one decree for sale of the land attached entered for all. There was no appearance by F. H. Paul to any of these actions, no actual service, no actual notice of their pendency.

It is claimed for appellants that the failure to allege in the two actions by Hughes that F. H. Paul was a resident of Henry county (in which the actions were brought) and a citizen of Kentucky, and the failure to allege in the Babbitt petition that Paul voluntarily remained within the Confederate States, were omissions fatal to the jurisdiction of the court rendering the decree of sale. In other words, there was a failure in two cases to allege residence or citizenship, and in the other a failure to allege that Paul voluntarily remained within the Confederate lines for the period of thirty days.

All three of these consolidated actions were evidently attempted to be brought under the second section of the act quoted, and were so treated by counsel in oral argument and in argument by brief, and it is manifest that the petition of Babbitt fails to comply literally with the provisions of this section by omitting to state that Paul voluntarily remained within the Confederate States, and that there was a substantial failure of compliance in the Hughes petitions in omitting to allege the residence and citizenship of Paul. Do these omissions, or any of them render, void the decree of sale for want of jurisdiction by the court rendering it?

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It seems on principle very clear that where a proceeding is authorized by statute against one who is to be constructively summoned, and there is no actual appearance, that the grounds for so proceeding should be strictly followed. It is in effect the taking of one man's property and giving it to another without his knowledge and without his consent. It has been uniformly held that, so far as the requirement as to such constructive process was concerned, it should be strictly and even literally followed. Why not so, for as good if not for a stronger reason, in cases where the grounds or the facts upon which the right to proceed at all are prescribed by statute?

In the case being considered it is manifest that, in the absence of this statute, the court would have had no pretense of jurisdiction over F. H. Paul or his property. In the absence of the statute the petition, the warning order and the attachment would have been ineffectual to confer jurisdiction. How then comes jurisdiction? It is not from the warning order alone—it is not from the attachment alone—it is not from both combined. This is too plain for argument. Something else is plainly essential, and that is a petition stating facts upon which both the warning order and the attachment are based. But suppose the petition states facts the existence of which do not, under the law, authorize the issual of the one or the other? In that case the proceeding would be outside the law as there is no such thing under our system of summary proceeding by reason of the common law. The authority to proceed at all is by reason of the statute, and, therefore, a compliance with its provisions is essential to the exercise of jurisdiction. We have no more right to disregard one of its provisions than we have to disregard all. If we can disregard the provision that the absent defendant voluntarily remained within the Confederate States, we can as well disregard the requirement that he should voluntarily have gone into the Confederate States, and as well the implied requirement that he was a citizen of Kentucky and a resident of the county in which the action is brought. This section of the act was construed by this court in Buckley v.

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Hall, 2 Duvall, 291, and the attachment issued held invalid because of the failure to allege the facts indicated. It is there said:

"The essential primary fact to be alleged is that the debtor has voluntarily left the county of his residence, thereby limiting the remedy, by implication at least, to residents of the State; next, that he has been absent therefrom thirty days; and, lastly, that during said period he has been, and continues voluntarily, within the so-called Confederate States or their military lines.

"The fact of his having voluntary left the county of his residence is nowhere alleged in the petition in express terms; nor does the language, by any allowable or reasonable interpretation, convey that meaning: for although it may be inferred that, as it is alleged, that he left the State with his family; that he left it voluntarily, still it by no means follows that he resided in the State. By the omission to allege that important fact in the original petition the attachment, when it was issued out, was unauthorized."

Where the grounds upon which an attachment may issue are prescribed in the statute a statement of such grounds in the affidavit or petition, as in this case, is the foundation of jurisdiction, and a failure, therefore, to state them renders all subsequent processes and orders of the court a nullity. The petition to be such as to confer jurisdiction must contain, first, a statement of the cause of action; and, second, grounds upon which the attachment is sought. It is not the truth or falsity of such grounds that confers jurisdiction, but the fact that they are alleged to exist. If they are alleged to exist all subsequent errors of the court are irregularities simply, and can be corrected only on appeal or by direct proceeding for that purpose. They can not be collaterally attacked.

Drake on Attachment (4 edition), section 437, says:

"This notice (warning order) is not necessary to give the court jurisdiction of the action. Its object is simply to inform the defendant, if possible, that proceedings have been taken against him. Whether a court has jurisdiction of any particu-

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lar proceeding is determined by establishing its authority to take the first step therein. When, therefore, in an attachment cause the ground required by statute has been laid for the issue and execution of the process, and the process has been issued and executed, the jurisdiction of the court attaches. If this ground be not laid, there is no right to take the first step, and that and all subsequent ones are simply void. * * * When, therefore, notice to the defendant by publication is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause." (Sections 88 and 89.)

In the case of Maples v. Tunis, 11 Humphrey, 108, it was held that a failure to state in the affidavit for an attachment the grounds prescribed by statute, although the attachment was every way regular, rendered all the proceedings void and the purchaser at the sale of the attached property took no title.

In the case of Conrad v. McGee, 9 Yerger, 428, the statute required that an attachment might issue when it was stated "that any person hath removed, or is removing himself or herself out of the county privately, or so absconds or conceals him or herself that the ordinary process of law can not be served." The affidavit upon which the attachment issued recites: "Oath having been made that the said Henry Dainwood hath absconded or so conceals himself from said county that the ordinary process of law can not be served upon him." It was held that the affidavit was so defective that all proceedings under it were void.

In the case of Staples v. Fairchild, 3 Comstock, 43, a proceeding by attachment founded on a verified application therefor, the court said:

"Although the application of Sanford, the creditor, was in writing and verified by his affidavit, and in it was specified the sum in which Bradley was indebted to him, over and above all discounts, and that such demand arose upon contract, and that Bradley was not a resident of this State, but a resident

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of the State of Connecticut, it does not state, as the grounds upon which the application was founded, either that Sanford resided within this State or that the indebtedness of Bradley to him arose upon a contract made within this State. It was first said on the argument that it was not necessary that the residence of the creditor should be stated in the application. That would be true in a case where the residence of the creditor was not the ground relied on to give jurisdiction to the officer to issue his warrant or attachment. Where the application omits to state that the residence of the creditor is within this State, to show jurisdiction in the officer it must state that the contract upon which the indebtedness arose was made within this State. It is not enough to specify the sum of the indebtedness that it arose upon contract, and that the debtor was a nonresident of this State. But to give jurisdiction to the officer it must be also stated in the application either that the creditor resides within this State, or that the indebtedness arose upon a contract made within this State."

It was held that the attachment having been issued without jurisdiction was void, and that the purchaser took no title to the premises sold under such proceedings.

The cardinal error in the argument of counsel for appellee is in assuming, first, that the court below had jurisdiction, and, that, therefore, all errors subsequently committed were mere irregularities. This is true if the court had jurisdiction, but that is the gist of the proceeding; and, secondly, in assuming that jurisdiction is complete by the actual or constructive service of summons on the defendent.

Both of these propositions are so much involved the one within the other that I will not attempt to separate them, but treat them as one.

In the case of Grigsby v. Barr, 14 Bush, 330, there was a proceeding to subject the property of a nonresident in which proceeding there was a warning order in due form, a prayer in the petition to subject a particular piece of real estate, and for an attachment against the defendant's property. No attach-

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ment was levied. The property was sold under judgment entered in that case, and susbequently the owners of the property, at the time of the institution of the suit and at the time of the sale, brought suit against the purchaser at the decretal sale and recovered upon the ground that, in the absence of the levy of an attachment, the warning order issued in due form and time did not confer jurisdiction, and, therefore, did not prevent him from proceeding to question collaterally the jurisdiction of the court rendering the decree of sale.

So it is seen that constructive process in attachment proceedings against one without the sovereignty is not in itself sufficient to confer jurisdiction. Nor can jurisdiction be acquired by simply making the required affidavit and having an attachment issued and levied.

The incipient step in the acquisition of jurisdiction in such cases is the filing of the affidavit setting forth the grounds authorizing the attachment, and if embraced in a petition, as in this case, there must be a statement of the cause of action. The next step is the making of the warning order, and, third, the issue and levy of the attachment. The expression, in some of the cases in this State, that jurisdiction is complete when there has been constructive service of summons, means nothing more than that without such service, no matter how complete the affidavit, there is no jurisdiction. For instance, in the case of Brownfield v. Dyer, 7 Bush, 505, where there was an ex parte action by warning order, this court held the whole proceeding void because the warning order required the appearance of the defendant at the next term of the court, which began within eighteen days, when the Code required the appearance at the next term not commencing within sixty days; that is, the court held that there was no constructive service of process, and that although the foundation for the action was properly laid in the affidavit for an attachment, there was no jurisdiction.

It is to be borne in mind, as already stated, that in such ex parte proceedings, when the ground for the attachment is stated in the affidavit, the petition must first state a cause of

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action; and, second, the grounds authorized by statute for the attachment.

In the case of Allen v. Brown, 4 Met., 342, relied upon by counsel for appellees, the court held that the judgment, where there was no attorney to defend, no bond executed and a failure to allege that the claim was just, was not void, but simply erroneous, and that on the return of the cause these errors might be corrected—the defendant having appeared and appealed from the judgment against him. This case proceeded upon the idea that jurisdiction had attached by a statement of the grounds for attachment and by the issual of the warning order. The proper distinction between the grounds of attachment and a statement of the cause of action seems not to have been disregarded.

In the case of Thomas v. Mahone, 9 Bush, 11, the jurisdiction of the court appears to have attached by filing the affidavit required by the act of December 23, 1861, and by the issual of a warning order, and was held that the fact that the attorney appointed to defend could not lawfully communicate with the absent defendant, and the failure to take bond for the restoration of the property were mere irregularities that did not render the judgment void. The court expressly recognizes that jurisdiction had attached, but erroneously states, by way of argument, that the jurisdiction came from the proper issual of the warning order alone. If the question had been as to whether the affidavit stated proper grounds for the attachment the opinion in that case would have some bearing, but the sufficiency of the affidavit as to the grounds for attachment are recognized in the opinion. So in the case of Bailey v. Beadles, 7 Bush, 383, relied upon by counsel for appellees, the grounds for attachment, the nonresidency of the defendant, were properly alleged, and a failure to allege the claim was "just" was held to be an irregularity simply.

It will be found in all the cases where it is said that the proceedings were not void because of the omission to do certain things; that jurisdiction had attached by allegation of the ex-

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istence of the grounds required by the statute, and that there had been constructive service of process.

It does not follow that because an affidavit in such cases is so defective that proceedings based upon it will be void, it may not be amended, nor, as a corollary, that if it can be amended it is not void. If there is no affidavit there can of course be no amendment because there is nothing to amend, but when there is the substance of an affidavit it may be amended. (Mayples v. Tunis, 11 Humphrey, 108; Drake on Attachment.)

As there was no amendment of the petitions in these cases I am of the opinion that the defects indicated were fatal to the exercise of jurisdiction by the court making sale of the property, and that, therefore, no title passed to the purchaser; and that as appellees claim through the purchaser they have no title to the land in controversy.

A. Duvall for appellants.

Geo. C. Drane for appellees.

KENTUCKY TRUST CO. OF LOUISVILLE v. LEWIS.

(Filed February 7, 1885.)

Constitutional law—Class legislation—Exclusive privileges—An act conferring upon a corporation, which performs no public service, the right to sell, without the intervention of a court, land mortgaged or conveyed in trust to it, is class legislation, and, therefore, unconstitutional and void.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

The act of the legislature incorporating the appellant, the Kentucky Trust Co., of Louisville, Ky., provides that it may "deal in the loaning of money, exchange, promissory notes and other evidences of debt, take personal and other securities for the payment thereof, and dispose of the latter as may be agreed upon in all respects as natural persons may do under the common law. * * * * The said company may negotiate loans of money, and may purchase, sell and manage property, real, personal and mixed, including stocks, bonds, bills, notes and other

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choses in action and evidences of debt, and may collect and adjust and settle the same for or on account of others, and may guarantee the payment of loans negotiated through it. In all matters committed or intrusted to its care, and with respect to loans made by it for or on account of others, it may, in case of default in or the nonpayment of such loans or indebtedness, exercise all the powers herein granted to it, with respect to securities for loans made by it, in the same manner as if such loans were made in its own right."

This appeal involves the power of the corporation, by virtue of the above provisions, to sell and convey real estate conveyed by deed of trust or mortgage to it, to secure either its own debt or one made by it for another, without the intervention of a court, or the maker of the deed of trust or mortgage joining in the conveyance.

By the act of February 11, 1820 (1 M. & B., 449), and which has in substance remained the law ever since (General Statutes, chapter 63, article 1, section 22), it was enacted: "That no sale hereafter made by any trustee, or trustees, under or by virtue of any deed of trust or pledge of any estate whatever, shall be good or valid; nor shall any conveyance made by any trustee or trustees pass the title or interest of any estate or property in any such deed mentioned, unless such sale shall be previously ordered or decreed by a court of chancery upon bill filed and proceedings had thereon as in the case of mortgages, unless the maker or makers of any such deed or pledge shall join in the deed or writing evidencing such sale or transfer."

No doubt the legislature intended to repeal this general law as to the appellant, the trust company, by giving it the power to dispose of real securities as might "be agreed upon, in all respects as natural persons may do under the common law."

The existence of this intention is further shown by a similar provision in the charters of various other corporations; and if there be a doubt as to the constitutionality of the law it should be resolved in its favor.

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It is claimed for it that it is but one of the many legislative acts giving exceptional, but not exclusive privileges; and that such legislation is not forbidden by our State Constitution; that it contains no words of exclusion, and that the like privilege may be granted by the legislature to any other corporation or person.

The general law above cited, however, affords the exclusion; and although the act in question does not forbid the granting of the same power to others, yet if the legislative will were to extend the privilege to others, and not to all, it would but create a privileged class.

In the case of Gordon, &c. v. Winchester Building Association, 12 Bush, 110, it was held by this court that the privilege of charging a greater rate of interest than is permitted by the general law can not be constitutionally conferred upon a corporation.

If it can not be done as to one it can not be done as to twenty; and if the latter number can constitutionally be granted the privilege now claimed, then a like number of persons or corporations may be given the power to charge a higher rate of interest than is allowed by the general law, or the same number may be given the exclusive right to manufacture cottons, with the reservation to the legislature of adding to such privileged class.

It is said by Judge Cooley that "the legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and can not be made for individual cases or for particular localities." (Cooley's Con. Lim., side page 391.)

The aim of the law should be equality of rights and privileges, affording "one rule for rich and poor, for the favorite at court and the countryman at plow."

It was, therefore, held in Lewis v. Webb, 3 Greenleaf, 326, that the legislature could not authorize an appeal in a special case in violation of the general law; in Durkee v. Janesville, 28 Wiscousin, 464, that a party could not be exempted from

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the payment of costs; in Holden v. James, 11 Mass., 396, that the statute of limitation could not be suspended in a particular case; and in Smith v. Marden, 4 Ky. Law Rep., 553, that an act extending the time for an officer to distrain for his fee bills beyond that allowed by the general law was unconstitutional.

It can not be claimed that the grant of privilege now in question is valid upon the ground that it interferes with the rights of no other person, because it reverses the attitude of the parties, and compels the person whose property has been sold to become a plaintiff if he desires to question the validity of the debt under which the sale has been made. Neither does it relate exclusively to the property of the trust company, and, therefore, afford no opportunity to do injury to others.

The serious objection, however, to it is that it is unequal and partial legislation; it is exclusive in its character; it favors the interest of one or a few by affording them a particular remedy, while the many are governed by the general law, which denies it. It grants a mode of doing business which the law does not give to the public; and the recipient of this partial legislation is a corporation devoted to private enterprise and ends; rendering no public service, and under no obligation to do so as is the case with a railroad, or a turnpike company, or a ferry. It is not even doing business as a bank, because by its charter it is not authorized to do so until it has a paid-up capital of $100,000; and hence the power in question can not be claimed for it upon the ground that as a bank it is bound to perform any services for the public, even if this be true of an incorporated bank. It is purely partial or class legislation as to the ordinary business of life, and as such is at war with the genius of our institutions, which impose equal burdens and confer equal privileges.

The grant, with an exclusive privilege, of a right or franchise of a public character, and appertaining to government, as in the case of a turnpike or a ferry, differs widely from one relating to the ordinary avocations of life, and the exercise of which pertains solely to the individual; and when a grant of

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the latter affects the individual rights of others, or affords remedies doing so, we have one law for the individual or a favored few, and another for the mass of the people.

Such legislation is beyond doubt contrary to our fundamental law, and at war with all equality of right; and we do not hesitate, therefore, to decide that the legislature by the attempted gift of such a power passed beyond its constitutional limit.

We are aware that the views herein expressed are not in accord with the case of Hahn v. Pindell, 3 Bush, 189. In that case a clause in the charter of the Falls City Bank of Louisville, similar to the one now in question, was considered, but more in the light of its policy, and whether the legislature intended by it to repeal the act of 1820, than in a constitutional view; indeed the question of its constitutionality does not seem to have been raised; but in so far as it may be considered as holding the grant of such a privilege valid it is overruled, and the judgment below is affirmed.

Beattie & Winchester for appellant.

Anderson & Bruce for appellee.

LOYD, &c. v. LOYD.

(Filed January 15, 1885.)

1. Homestead—Right of children to—Infant children are entitled to homestead in the land of their father, not only against his creditors, but also as against his other children who are adults. 2. The children are entitled to homestead, though he may not have left a widow.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by Jarrett and Jasper Loyd, unmarried infant children of Jarrett Loyd, deceased, who sue by their statutory guardian to have set apart to them a homestead out of a tract of land of which their father died the owner.

It is alleged in the petition that their father died in 1875 intestate, leaving eight children, but no widow, surviving him, all of whom were of full age except the plaintiffs; that at the

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time he died he was a bona fide housekeeper with a family, owning and occupying a tract of land containing about 200 acres, of which fifty acres have been sold under judgment of court to pay debts against his estate. It is further alleged that since his death four of his children have sold their undivided interests in the residue of the land to one Stephens, and the remaining half belongs to the plaintiffs and their sister Susan and brother, Samuel Loyd, both of whom, together with Stephens, are made defendants to the action.

Summons appears to have been served only upon Susan Loyd, who filed a general demurrer to the petition, which was sustained, and she is the only appellee before this court.

The question presented is whether appellants, the facts stated in their petition being true, are entitled by law to a homestead right in the unsold part of the land left by their father to all his children.

Their claim is not disputed by any creditor of the estate of their deceased father, but the contest is between them and Stephens, the purchaser, and the two joint heirs, who still retain their shares in the land.

The determination of the question depends upon the construction to be given to that portion of article 18, chapter 38, General Statutes, relating to homestead exemption, and particularly to section 14, which is as follows:

"Section 14. The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age. But the termination of the widow's occupancy shall not affect the right of the children; but said land may be sold subject to the right of said widow and children if a sale is necessary to pay the debts of the husband."

It is contended by counsel that the statute was made to protect poor debtors and their families from creditors, and that the legislature has not anywhere shown an intent to affect the laws of descent, or those regulating the partition of land.

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The title of the original homestead act, approved February 10, 1866, was "An act to exempt homesteads from sale for debt." Nevertheless it was expressly provided in the last clause of section 5 of that act that "such exemption shall continue after the death of the defendant for the benefit of the widow and children, but shall be estimated in allotting dower." And this court in the case of Gasaway v. Wood, 9 Bush, 72, construing that act, held that the widow, even if there be no children, is still entitled to the homestead, her right to the benefits resulting from the enactment not being made to depend upon such a contingency.

In that case the husband had died, leaving no children, and the controversy was directly between his widow and heirs at law as to her right to a homestead in the land left by him. There it was contended, as in this case, that the law was intended to affect the rights of creditors only, and not to prevent the heir at law taking his share of the estate. But this court held otherwise, using the following language:

"As there is no provision of the statute making an exemption after the death of the husband except for the benefit of the widow and children, a judgment determining the right of the brothers and sisters of the husband to recover possession of the land in this case would in effect be deciding that the provisions of the act conferred no right of exemption in behalf of the widow where the husband died without children. Such a construction would not only be in conflict with the express language of the act, but with its true meaning and spirit."

After that decision the General Statutes were adopted, section 13 of the article relating to homestead exemption being identical with section 5 of the act of 1866, but section 14, just quoted, was added.

The question then naturally arises, what was the object of the legislature in adopting section 14 as an amendment to the original act? It could not have been to either add to or define with more certainty the rights of the widow, for they already

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existed under section 5 of that act, as construed by this court, as fully and clearly as they do now under section 14.

Although it is somewhat difficult to perceive why the rights of the children to the benefit of homestead exemption was not, under section 5 of the act of 1866, as absolute as that of the widow, still the nature and extent of their right had not, before the adoption of the General Statutes, been judicially ascertained and determined. And it is, therefore, reasonable to conclude that one object at least of section 14 was to define and make certain, if not to enlarge, the rights of infant children under the homestead law.

By section 5 of the original act it was provided that the exemption should continue after the death of the debtor for the benefit of his widow and children generally. But section 14 restricts the right to unmarried infant children, who, in the language of that section, shall be entitled to a joint occupancy with the widow until the youngest unmarried child arrives at full age. And that right can not be affected by the termination of the widow's occupancy, whether it be on account of her death or abandonment.

The law does not in terms make the right of the children depend upon the contingency of there being a widow at the death of their father, nor is it susceptible of that meaning.

On the contrary, inasmuch as the right of the widow under the original act had been held by this court not to depend upon the contingency of there being children left at the death of her husband, it is a fair inference that the legislature intended by giving to the infant unmarried children a right to a joint occupancy with her, which could not be affected by a determination of her occupancy, to place them on an equal footing with her, and to give them the right not dependent upon there being a widow at the death of their father. For the same reason that there is for continuing the right to the infant unmarried children after the termination of the widow's occupancy, exists with equal force for giving them the right in the first instance, though there be no widow when their father dies.

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There is by law certain personal property exempt from distribution and directed set apart to the widow, whether there be infant children or not. But if there is an infant child or children and no mother surviving, the law requires the same articles to be set apart for the support of such infant children.

The reason for extending the benefits of the homestead law to the infant children is the same as that for exempting personal property, which is their support while in a helpless and dependent condition. And it is, therefore, to be presumed that the legislature did not intend in one case to give to the infant children the absolute right to the benefit of exempted property, and in the other make it contingent.

In our opinion, therefore, appellants, according to the statements in their petition, are entitled to the same right under the homestead law that they would have been if their father had died leaving a widow, and the court erred in sustaining the demurrer.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

R. W. Slack for appellants.

Jolly & Todd for appellee.

MITCHELL v. RIPY, &c.

(Filed January 10, 1885.)

False imprisonment—County in which action must be brought—Where a warrant for the arrest of appellant was issued in one county, but he was actually arrested and imprisoned in another, his action for false imprisonment must (under Civil Code, section 74) be brought in the latter and not the former county.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellant against appellees, Ripy, Cohen & Edwards, to recover for false imprisonment.

It is alleged in the petition that by the advice and procurement of Ripy, appellees, confederating together, maliciously and without probable cause and with force, seized and confined

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appellant in the county of Marion from the 15th to the 17th of February, and continued the arrest and false imprisonment by taking him against his will to the county of Anderson, and there continuing said false imprisonment until the 21st of February, when he was released.

It appears from the evidence that on the — day of February appellee Edwards made an affidavit before the judge of the Anderson County Court in substance that he had reasonable grounds to believe that appellant had been guilty of a felony in Anderson county, committed by conspiring to burn the distillery of T. B. Ripy and murder him, and that one Martin Sams, W. Landrum and J. W. Mitchell were also guilty. And thereupon a warrant for the arrest of appellant was issued, directed to any peace officer, marshal, policeman, constable or sheriff of the Commonwealth, and placed in the hands of the sheriff of Anderson county, but he was not found in that county.

On the 15th of the month appellee, Cohen, sent a telegram directed to the marshal of Lebanon or sheriff of Marion county, where appellant then resided, directing them to arrest and hold him, charged with attempted murder and arson. And on the 17th another was sent to the marshal who had arrested appellant, directing that he be brought to Anderson county.

Appellant being brought before the police judge of Lebanon, an order based on the two telegrams was made directing him committed to the custody of the marshal, and by him carried to the county of Anderson, and there delivered to some magistrate to be dealt with according to law. And in pursuance of that order he was taken before an examining court of that county for trial, but no evidence being offered against him by the Commonwealth he was discharged from custody.

Upon the conclusion of the evidence in this case by the plaintiff a motion was made for a peremptory instruction to the jury to find for the defendants, which was overruled. But at the conclusion of the evidence of the whole case the motion for a peremptory instruction being renewed was sustained by

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the court, and a verdict and judgment rendered for all the defendants.

There is no evidence in the record showing or conducing to show that appellee Ripy advised or aided in procuring the warrant for the arrest of appellant, or in sending the telegram to Lebanon that caused him to be arrested, or did anything, directly or indirectly, to have him arrested and imprisoned.

Appellee Cohen was at the time county attorney for the county of Anderson, and did nothing more in causing the arrest and imprisonment than to prepare the affidavit, at the request of the person making it, upon which the warrant was issued by the county judge, and to send the telegrams mentioned to Lebanon.

There is no evidence whatever that he did anything except in good faith and in his official capacity as county attorney.

The affidavit required by law in such cases having been made by another person, it was his duty to advise and procure a warrant for the arrest of appellant, and we are not prepared to say that his action in sending the telegram to Lebanon was outside his official duty. Certainly there is no evidence showing or conducing to show he caused the arrest and imprisonment of appellant maliciously and without probable cause.

Wherefore, as there was no evidence on the trial to sustain a verdict in favor of appellant against appellees, Ripy or Cohen, he was not prejudiced by the instruction of the court so far as it affected them.

But as it appears from the evidence that appellee Edwards made the affidavit upon which the warrant was issued that caused the arrest and imprisonment of appellant, and as no evidence whatever was produced at the examining trial showing any ground for the affidavit which should have been left to the jury to say whether or not, from all the eivdence before them, he caused the arrest and imprisonment maliciously and without probable cause. As to him, therefore, the court erred in giving the peremptory instruction.

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This action having been commenced and tried in the Marion Circuit Court, a question of jurisdiction is presented for our decision.

Section 74, Civil Code, by which the question is to be determined, is as follows: "Every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff, against a person residing in this State must be brought in the county in which the defendant resides, or in which the injury is done."

As all the defendants resided in the county of Anderson when the action was brought the jurisdiction of the Marion Circuit Court depends upon the meaning of the words "in which the injury was done."

In determining this question the first and most natural inquiry that arises is, for what injury to the person of the plaintiff was this action brought? The affidavit was made and the warrant for the arrest was issued in the county of Anderson. But it is clear that if nothing more had been done the plaintiff could not have maintained this action in any court.

The personal injury of which the plaintiff complains and for which this action was brought is his arrest and imprisonment. That was accomplished—done in Marion county.

The action is against defendants who, it is alleged, maliciously and without probable cause procured the warrant of arrest to issue, by means of which the injury complained of was done. And, in our opinion, the jurisdiction of such an action is, in the meaning of the Code, no more determined by the county in which the criminal law may be wrongfully put in motion than it is controlled in an action for assault and battery by the place where a conspiracy may be hatched to accomplish the beating or wounding.

Necessarily every injury to the person accompanied with force must be done at the place where the person is at the time of the injury.

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Wherefore, the judgment is reversed and cause remanded for a new trial as to appellee Edwards, and affirmed as to appellees, Ripy and Cohen.

Russell & Russell, Sam Avritt and Hill & Rives for appellant.

P. B. Thompson, Sr., for appellees.

McINTIRE v. McINTIRE'S EX'OR, &c.

(Filed January 29, 1885.)

Partition—Proper parties—Where an action is brought (under Civil Code, title 10, chapter 15) by a joint tenant for partition of the land, those only are entitled to be made parties who claim an interest jointly with him; those who claim adversely are not necessary or proper parties.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

This action was instituted in the county court under chapter 15, title 10, Civil Code, by the executor of one joint tenant against another to have a tract of land held and claimed by them under the same deed divided between them.

In the petition which appellant offered to file he alleges that neither the testator of the plaintiff nor the defendant ever had a valid title to the land, but the deed under which they claim was fraudulently obtained from his deceased father, and is without consideration and void, and that he, as heir at law of his father, is the owner, and entitled to one-eighth of the land.

Whether the court erred in overruling appellant's several motions to file his petition to be made a party defendant and to transfer the action to the circuit court is the question presented on this appeal.

The object of chapter 15 is to regulate proceedings for the division of land held jointly and the allotment of dower, and a person desiring a division may file in the circuit or county court a petition containing a description of the land, and a statement of the names of those having an interest in it. And when, as required by section 499, all persons interested in the

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property who have not united in the petition shall have been summoned to answer ten days before the commencement of the term, and the written evidence of the title to the land is filed with the petition, the court in which the action is pending is required to appoint commissioners to make the partition.

Section 23 provides that any person may be made a defendant to an action who claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved in the action.

But that section has no application to an action in the county court for a division of land, for the reason that by section 499 the persons who are required in such cases to be made defendants are specifically mentioned, being those having an interest in the land not adverse to the plaintiff, but a joint interest with him.

No other proceedings are required nor provided for by chapter 15, except such as are necessary to effectuate the division of land held jointly, or to allot dower, as the case may be.

It is true subsection 10, section 449, provides that a party summoned may by answer controvert the allegations of the petition, and contest the rights claimed therein, and in such case the action may, as authorized by subsection 11, be removed to the circuit court. But as only a party summoned is authorized by that section to file such answer, and only a person having or claiming a joint interest in the land with the plaintiff is required to be summoned, it would seem that a person claiming the land under a different and hostile title could not claim as his right to be made a party. It is not necessary to a division of the land amongst those holding it jointly that he should be a party, nor is he bound or his rights at all prejudiced by such division. Appellant has now, as he had before the judgment for the division was rendered in this case, the right to sue for the land, and, if entitled, to recover in the circuit court.

Judgment affirmed.

Jas. Montgomery for appellants.

Bush & Robertson for appellees.

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ARMSTRONG v. KLEINHANS & SIMONSON.

(Filed October 28, 1884.)

Trade-mark—Name of place—Injunction—Appellant used the words "Tower Place" to designate the place or store where he did businesss, and not the kind of business he did, Held—The words did not constitute a trade-mark, and he having moved could not enjoin the owner of the building or a subsequent tenant from continuing to designate the house as "Tower Palace."

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellant, a merchant engaged in the clothing business in the city of Louisville, seeks in this action judgment requiring appellees, engaged in like business, to remove from a store-house, No. 150 West Market street, occupied by them, a sign, "Tower Palace," denominated in the petition his trade-mark, and enjoining them from appropriating or using it by advertisement or otherwise.

The building was erected by J. G. Mathews, the proprietor, in 1871. But before it was fully completed he leased it to appellant, who took possession in November of that year, and occupied it until 1877, when he removed to a house on Jefferson street, where he has since carried on the same business.

Sometime after he left Mathews took possession of the house on Market street and used it as a carpet store until 1879, when he leased it to appellees.

Soon after appellant took possession of it a large and conspicuous open sign was placed above, but supported by a structure upon top of the building called a tower, and above the sign was a flag, on each side of which were the words "Tower Palace." And the same words were also moulded in an iron slab used as a door sill at the threshold. Upon each side of the building, which was higher than those adjoining it, and some distance below the tower, was painted "J. M. Armstrong, Men and Boys' Clothing," and over the front door his name was put.

When appellant left the building he, without the consent of Mathews, took the sign from the tower and placed it upon the

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house to which he removed on Jefferson street. But when Mathews took possession he put a new sign of "Tower Palace" where the other had been, and called his store, while he occupied the building, "Tower Palace" Carpet Store, and that sign was upon the tower when appellees got possession, and is yet there.

It appears from the evidence that appellees in advertising their business indicate the place where it is carried on as "Tower Palace, No. 150 West Market street," but describe their store as "The Mammoth Clothing Store," and the latter words, together with their firm name, are painted on the sides of the building.

Immediately after taking possession in 1871 appellant commenced to advertise his business extensively in the newspapers and other ways usually resorted to by enterprising merchants, and succeeded in making both his business and the place on Market street widely and favorably known. And there is evidence tending to show that since his removal to Jefferson street he has lost some custom on account of the house on Market street being still designated by the name of, and the business of appellees being advertised as conducted at, the "Tower Palace." But to what extent he has been injured by the confusion and clashing of interests caused by two houses in the same city, where the same kind of business is transacted, being called by the same name does not appear, nor is it necessary to inquire in order to determine whether he is entitled to the relief sought in this action.

The controlling question in the case is, has appellant acquired an exclusive property right to the name or sign "Tower Palace," transferable to any place of business he may occupy, or was it merely used by him while he did business on Market street as an appropriate description of the building there?

If he has a personal right to the name the use and appropriation of it by appellees in the manner they have done must be regarded as deceptive, and an unlawul injury to his business. But if, on the contrary, the name was originally intended

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and used to designate the building the sign upon the tower is not deceptive, nor the advertisement by appellees of their place of business as being "Tower Palace, No. 150 West Market street" untrue, and consequently appellant can not maintain this action.

The building was erected by Mathews, the owner, for a merchant's business house, according to a model of his own selection, is eligibly situated, three stories high, has ceilings of unusual height, and, being surmounted by the structure called a tower, presents an imposing and striking appearance.

One-half the costs of the sign first placed upon the tower was paid by appellant and Mathews each, the latter proffering to contribute because, as appellant testifies, he was proud of his building and not satisfied with the wooden sign about to be put up.

There is some controversy whether appellant or Mathews originated the name "Tower Palace." But it is affirmatively, and we think satisfactorily, proved that Mathews had determined to give that name to his building before it was completed or leased to appellant.

The architect who superintended the erection of the building testifies that the structure upon top of it can not be aptly called a tower, and it probably resembles more an observatory than a tower. But whether it can with technical accuracy be so denominated or not, it has from the beginning been called a tower by all parties interested, and the name "Tower Palace," which appears to have been accepted by the public as appropriately applied to the building, was undoubtedly suggested by it. Moreover, as conclusive evidence that appellant regarded it fittingly to call it a tower, and apply the derivative name to the building, in advertising the opening of his business there in 1871 he described the place as "Tower Palace," and the structure upon it as "the beautiful tower that commands a magnificent view of the Ohio river bridge, etc."

It may be true that the house on Market street acquired some additional celebrity and was increased in value as a business stand by the skill and enterprise of appellant in bringing

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it to public notice as his place of business; but it is also true that he availed himself of the advantage of its eligible location and excellence as a business place to increase his business. And, in our opinion, the evidence clearly shows that while he occupied it the name "Tower Palace" was adopted and used by him, and understood and recognized by his customers as a peculiar and appropriate designation and description of the house, and not of the business he carried on there. Such being the case, can the name now, without the consent and to the injury of Mathews, the owner, and his tenants, be detached from the building, made to assume a secondary and wholly different signification, and untruthfully applied either to the house occupied by appellant on Jefferson street, that has nothing about it suggestive of a tower, or to the business done there by him?

In the case of Howard v. Henriques, 3 Sand., 725, the plaintiff was proprietor of a hotel, known as "Irving House" or "Irving Hotel," and the defendants having opened another hotel in the same city which they named "Irving Hotel," were enjoined from using the name.

In that case the court said: "We think that the principle of the rule is the same to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill rendered valuable, whether the same is upon articles of personal property which may be manufactured, or applied to a hotel where he has built up a prosperous business."

In the case of Booth v. Jarrett, 52 Howard, 149, the plaintiff, Edwin Booth, established a theatre called "Booth's Theatre," and afterwards assigned the lease to J. B. Booth, under whom the defendants claimed. It was held the plaintiff was not entitled to an injunction restraining the defendants from continuing the name Booth in connection with the theatre. The ground upon which the injunction was refused was that the plaintiff's name had become affixed to the establishment, and did not imply that it was conducted by him.

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The protection afforded by the courts in such cases is to the good will of a trade or business which, in Story on Partnership, section 99, is defined to be "the advantage or benefit which is acquired by an establishment beyond the mere value of capital stock, funds, or property employed therein, in consequence of the general public patronage or encouragement which it receives from constant and habitual customers on account of its local position or common celebrity, or reputation for skill, affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." And in the same connection Lord Eldon is quoted as saying that "a good will of this sort was nothing more than the probability that the old customers would resort to the old place."

In each of the two cases cited the name of the original proprietor was given to the place, and was connected with the business carried on there, for which the building was erected and to which it was adapted. And while it is not in terms stated in the first-mentioned case, as it is in the second, that the name had become affixed to the establishment, it is obvious that it is true in the one as in the other, and constituted in both the reason for the conclusion arrived at.

If the distinctive name of a hotel or theatre may be the subject of appropriation, as was correctly determined in the two cases referred to, we do not perceive a satisfactory reason why, upon the same principle, the name of a house constructed for the purpose of, adapted to, and valuable as a merchant's business house, may not as well be appropriated and used by the owner or his lessees in connection with the business carried on there. But it is not necessary to decide that question, as the issue here involved is as to the exclusive right of appellant to the name in contest.

In the case of Pepper v. Labrot & Graham, decided by Justice Mathews of the Supreme Court of the United States, which may be found reported in 8 Fed. Rep., 29, and also in 8 Ky. Law Rep., 126, a question similar to the one here presented was elaborately considered.

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Pepper, the complainant, had at one time been the owner by inheritance of a tract of land whereon his father, for many years before his death, had carried on a distillery known as the Oscar Pepper Distillery, at which a superior quality of whisky, celebrated as "Old Crow" whisky, was manufactured. When the complainant, after the death of his father, got possession he erected a new distillery on a different part of the tract of land, at which he manufactured whisky, branding on the heads of the barrels containing it the words "Old Oscar Pepper Distillery Hand-made Sour-Mash, James E. Jepper, Proprietor, Woodford County, Ky."

Subsequently he became bankrupt and the land and distillery were sold, and eventually became the property of the defendants, Labrot & Graham, who manufactured whisky there, putting upon the heads of their barrels the same words, except that their firm name was substituted for that of the complainant.

The object of the action was to enjoin the defendants from appropriating the words "Old Oscar Pepper," which the complainant claimed to have originated and adopted as his trademark to designate whisky made by him without reference to the place of manufacture.

It was held as a fair inference from the numerous authorities referred to in the opinion of Justice Mathews that when a trade-mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired in connection with his own manufacture at the same place of a similar article by operation of law. And applying that rule he held that "the words 'Old Oscar Pepper Distillery' never lost their primary signification and never acquired a secondary meaning. And as applied to the whisky made by the complainant the words 'Old Oscar Pepper' never came to mean more than whisky made at that particular

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distillery. They did not become a denomination of whisky, as the manufacture of the complainant or of any person, but characterised it only as entitled to public favor by reason of the reputation of the particular distillery at which it purported to have been made."

It was accordingly decided not only that the complainant had no right to the exclusive use of the words claimed by him as his trade-mark, but that he had no right to use them at all in connection with whisky manufactured at a different place, because to do so would deceive the public by a false representation in respect to the place of manufacture.

We have been referred by counsel to the case of Woodward v. Lazar, 21 Cal., 448, in support of appellant.

In that case Woodward, being the lessee of a lot of land, erected a building upon it used by him as a hotel, to which he gave the fanciful and arbitrary name of "What Cheer House." Before the expiration of his lease he purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as one establishment under the name of "What Cheer House," the sign being removed from the first and placed upon the second building. He afterwards surrendered the leased premises, but continued to carry on the business of the "What Cheer House" in the building erected by him on his own lot.

Afterwards the defendants purchased the first mentioned lot and building, and opened a hotel under the name of "Original What Cheer House."

It was held in that case that the name established for a hotel is a trade-mark in which the proprietor has a valuable interest. That a person may have a right, interest or property in a particular name which he has given to a particular house, and for which house, under the name given to it, a reputation and good will may have been acquired. But a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not

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thereby make the name a fixture to the building, and transfer it irrevocably to the landlord.

We do not assent to the proposition that a tenant has the right to apply a name to a building without the consent of the owner, nor that a name which is intended to be, and is, descriptive of the place, as distinguished from the name adopted as a trade-mark and applied to the particular business carried on there, can, at the pleasure of the tenant, be made to change its orignial signification and applied to another and distinct place.

But conceding the correctness of the conclusion of the court in that case, it does not sustain the claim of appellant. There the name of the hotel was not applicable to or descriptive of a particular building, but was arbitrary, and applied to the business carried on first in the building upon the leased premises, and afterwards in both of the buildings. Here the name "Tower Palace" was intended to describe and designate the place, and not the particular business, nor the person carrying it on. It never was used as a trade-mark by appellant, but simply to indicate the particular place on Market street where he did business. And consequently he never acquired the exclusive right to use the name, except as applicable to and while he occupied that particular building.

The judgment must be affirmed.

Elliott & Hemingray and Muir & Heyman for appellant.

Frank Hagan for appellees.

MERRIFIELD & CO. v. MERRIFIELD'S ASS'EE, &c.

(Filed January 22, 1885.)

1. Deed construed—Intention of grantor—Where A, in order to equalize his son with his other children, conveyed to him a tract of land, but provided that it should be subject to his (A's) and his wife's debts, Held—That though this language is broad enough to subject it to their debts generally, yet when A's intentions are considered it is liable for their debts made for necessaries only, and not to those for which the wife became liable as surety after her husband's death.

2. Homestead—Right of dowress and remainderman to—The widow and remainderman are not both entitled to homestead.

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Appeal from Nelson Circuit Court.

Opinion of the court by Judge Lewis.

May 16, 1872, for the purpose and consideration stated in it, D. B. Merrifield, of the county of Nelson, executed to his son, D. B. Merrifield, who likewise signed it, a deed substantially as follows: "Whereas, I have heretofore conveyed to my son, A. H. Merrifield, the farm on which he resides; to the children of my son, J. B. Merrifield, the farm on which they reside, and to my son, W. J. Merrifield, a farm in Spencer county; now in order to secure to my son, D. B. Merrifield, as much of my estate as will make him about equal with the other children at my death, I hereby convey to him the farm on which I now reside, containing about 264 acres, and also my personal estate, cash notes and turnpike stock, except a note given by my son, A. H. Merrifield, for $844.51, which is to be given over to my son, W. J. Merrifield, after my death, and I covenant to warrant the title. Nevertheless this conveyance is made and accepted with the following conditions: That myself and wife are to hold possession and have full control of the property hereby conveyed during our lives, or to the survivor after the death of either of us, and to be subject to the debts of both, or either, of us contracted during our lives and funeral expenses after our death. And that the said D. B. Merrifield shall pay my son, W. J. Merrifield, in two years after the death of myself and wife, the sum of $1,000."

Within about four months after the execution of the deed Fielding Merrifield died, leaving Abigail Merrifield, his widow, who, jointly with D. B. Merrifield and his family, continued as they had done before his death, to occupy the farm conveyed.

No debts were contracted by Fielding Merrifield subsequent to the execution of the deed, nor does the record show that his widow has contracted any on her own account. But it appears that after his death, D. B. Merrifield became so much embarrassed in his business and involved in debt, and involved his mother as his surety to such an extent, that they united in a

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deed conveying to Tyler, in trust for the payment of his debts, all their property of every kind not exempt from execution, including that mentioned in the deed from Fielding Merrifield.

This action was instituted by Tyler, trustee, for the purpose of settling the estate conveyed to him, having the property sold, and the proceeds applied to pay the debts.

Of the large indebtedness of D. B. Merrifield, Abigail Merrifield became liable as his surety for about $15,000, and the debts without personal security amounted to more than $7,000. And as the entire property in the hands of the trustee sold for only $12,000, a question arose between the two classes of creditors as to priority.

By the judgment rendered it was determined that the land conveyed by the deed from Fielding Merrifield to D. B. Merrifield is subject to the debts which Abigail Merrifield may have contracted since the death of her husband, either as principal or surety, and it was ordered that in the distribution of the fund arising from the sale the trustee should pay to the creditors upon whose debts she was surety until they were paid in full, and the balance be held subject to the further order of court.

It was further adjudged that D. B. Merrifiled is not entitled to a homestead in the land. But $1,000 of the fund was directed to be set apart for the use of Abigail Merrifield in lieu of her homestead, the interest on which sum is to be paid her annually.

From that judgment D. B. Merrifield and the creditors, upon whose debts he alone is liable, have appealed.

It is obvious that the fund subject to distribution will be exhausted before the preferred creditors are paid in full and the other creditors will, under the judgment, get nothing.

It is, therefore, a material question whether the creditors to whom preference has been given are legally entitled to it, and the determination of that question depends upon the meaning that should be given to the clause of the deed which we have

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italicised, and how far that clause shall control in the construction of the deed.

It may be that the import of the clause in question, isolated and construed literally, is to reserve to the grantor while living, and afterwards to his widow, the right to subject at will the property conveyed to any debts they, or either of them, might thereafter create. But the first inquiry in this, as in every such case, is what the parties to the deed themselves meant and understood the language employed by them to mean. And if, when the whole instrument is considered and force and validity given as far as possible to every part, it can be made fairly susceptible of the actual meaning of the parties, it should be so construed.

The object of the deed, as recited therein, was not merely to give, but, in the language used, to secure to the grantor's son, D. B. Merrifield, as much of his estate as would make him about equal with his other children, to each of whom he had previously given a farm absolutely. And as conclusive evidence of such being the controlling intention and desire of the grantor, he not only specifies and describes the property which he had previously given to each of his other sons, but stipulates that a note he held against one of them should after his death become the property of another, and that to the latter the grantee, D. B. Merrifield, should also pay $1,000 after the death of himself and wife.

And in pursuance of the object and intention thus declared and made manifest by the instrument itself the grantor, in express terms, conveyed a definite interest in the property described, formally covenanting to warrant the title thereto, and as part consideration the grantee agreed, and by signing the deed, bound himself to pay the $1,000 mentioned.

But if the clause in question be construed according to its literal meaning and made to control in the construction of the deed so as to reserve to the grantor while living and give to his widow the unrestricted and unconditional power to encumber

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and subject the property to their debts without limit as to amount, or regard to the character, object, or necessity of such debts, it follows that the deed, instead of securing to the grantee an equal or any share at all of his father's estate, deprives him of the right to the possession, while either of them live, of the property conveyed, and also makes contingent and uncertain what, by previous clauses of the deed, was vested and certain. In fact, instead of securing to him the property purporting to be conveyed, the deed thus construed has the effect to deprive the grantee of what he would, by operation of law, have been entitled to absolutely at the death of the grantor. For without the deed he would then have received about the same property, or its equivalent in value, subject in part only to the dower or homestead right of the widow.

It is, therefore, clear that such a construction of the deed is inconsistent with the declared object and ascertained intention of the parties, and would operate to render the contract ineffectual; for under it the grantee could acquire no title or interest whatever not subject to be defeated or destroyed at the will of the grantor or his widow.

But as contracts should be supported where it can be done, rather than defeated, it becomes necessary to determine whether, without doing violence to recognized rules of construction or to the language employed by the parties in this case, a meaning can be given to the clause mentioned that will harmonize it with other parts of the deed, and allow the contract carried out as they intended and understood it.

In every case where the meaning and intention of the parties to a contract does not plainly appear to be otherwise, it should be held to mean what the law, in the absence of an agreement between them, would prescribe. And, as in this case, the deed, when all its parts are considered together, does not show that the grantor intended to give to the grantee, his son, a less estate in value than he would have inherited from him, nor than paternal feelings usually prompt just-minded men to give to their children, the deed should be so construed

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as to correspond with the law of descents and distribution, except so far as the parties in express and unambiguous terms have made a variance.

There can be no question of the right under the deed of the grantor and his widow to a life estate in the property, for that is in express and plain terms reserved, and is not inconsistent with the interest in remainder secured to the grantee in the preceding parts of the deed, nor is such reservation materially different from what the law gives to a widow.

The law, for the purpose of her support, secures to the widow certain personal property and a dower or homestead right in the land of her deceased husband, but, regarding the rights and interests of the heir at law or devisee, withholds from her the right to alienate the estate.

The grantor in this case, having in view the reasonable and comfortable support of his widow, and that object only, for no other in respect to her is disclosed, reserved to her the right to hold and control while she lived all the property conveyed. But looking to the rights of the grantee already secured, or intended to be secured, and also to his welfare, as we must presume he did do, he withheld from her the right of alienation.

The conclusion is, therefore, a reasonable one, that in providing that the land should be subject to the debts of himself and widow, the grantor meant only such debts as either of them might contract for their necessary and comfortable support. And, in our opinion, such is a fair construction of the clause in question, and the only one that can be given that will make the deed consistent, and effectuate the manifest intention of the parties.

The precise age of Fielding Merrifield is not shown, but he was evidently an old man at the date of the deed, desirous of being relieved and relieving his wife of the cares, risks and responsibilities of active life. The evidence shows that his widow was more than eighty years of age when she became liable as surety for some of the preferred debts. If then it was neces-

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sary to resort to other evidence than what it furnished by the deed, the age and condition of the grantor and his wife satisfactorily shows that it was not intended for an unrestricted right to encumber the property conveyed to be reserved to either of them. Nor is it necessary to apply in this case the rule construing a deed against the grantor, in order to avoid such meaning of the clause making the reservation. For that construction would even render insecure the support intended to be secured to the grantor and his widow as well as defeat the title of the son.

As, therefore Abigail Merrifield had no right under the deed to subject the property to the payment of debts created for any other purpose than directly for her necessary and reasonable support, the court erred in giving preference to those creditors upon whose debts she was liable merely as surety for D. B. Merrifield.

The widow of Fielding Merrifield was not a party to the deed in question, nor has she, in the manner provided by law, conveyed or parted with her homestead right in the land. In the case of Robinson v. Smithy, 4 Ky. Law Rep. (542, 80 Ky., 686), it was held that a widow holding a life estate in land devised by her husband, with remainder to her children, and in the occupancy of the land was entitled to a homestead as against her creditors. Whether the widow in this case claims a life estate under the deed or not, as she was in possession at the death of her husband and never parted with her right, she was clearly entitled to the use of the $1,000 set apart in lieu of her homestead.

But both she and D. B. Merrifield can not have a homestead in the land. It was decided in the case of Maguire, Helm & Co. v. Burr, 4 Ky. Law Rep., 659, that joint owners of a tract of land, upon which they both live in separate buildings with their families, are each entitled to a homestead, although the land has not been divided.

But this court has never gone so far as to determine that both the widow and remainderman can at the same time have

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a homestead in the same land, nor do we think the statute can be so applied and extended.

The theory of the homestead exemption is that the debtor requires a prescribed amount in value of land to be set apart for the support of himself and dependent family, but to accomplish such beneficent objects he must have the right to occupy and use it, and hence it is an indispensable requisite that a party claiming the exemption must be in the possession. But a party having merely an interest in remainder is without any right to the possession, and in the meaning of the law not in possession.

Wherefore, the judgment is reversed as to A. H. Merrifield and Allen Atherton & Co., and affirmed as to D. B. Merrifield.

G. H. Fulton, E. E. McKay, J. H. Wathen, J. A. Fulton and C. T. Atkinson for appellants.

Wm. Johnson for appellees.

SUPERIOR COURT OF KENTUCKY.

COMMONWEALTH v. ROSENBAUM.

SAME v. OPPENHEIMER.

LOWE v. COMMONWEALTH.

(Filed February 18, 1885.)

Liquor license—Wholesale dealer—Malt liquors—(a) A wholesale dealer can sell liquor by the wholesale without a license. (b) But he can not retail it without a license, no matter whether it is or not to be drunk on his premises. (c) The same penalty is imposed for selling malt liquor without license as for selling spirituous or vinous liquors.

First two appealed from Jefferson Court of Common Pleas and last from Boyd Circuit Court.

Opinion of the court by Judge Richards.

The first of these cases presents the question whether a wholesale liquor dealer is required to obtain a license to sell by retail, where the liquor is not drunk on the premises or adjacent thereto; by the second we are asked to decide whether the wholesale dealer must obtain a license before selling by the

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wholesale; the third case raises the question whether malt liquors are embraced by the statute denouncing a penalty for selling without a license. These questions are so intimately connected that the three cases will be considered together.

1st. To whom and by whom are licenses to be issued under the General Statutes?

By article 1 of chapter 106 the county court is authorized to grant licenses to tavern keepers which will authorize them to retail liquors.

Article 2 of the same chapter provides for licensing merchants by the same tribunal.

The general laws do not contain any provision for the licensing of a person not embraced by one of these two classes. In the exercise of the authority thus conferred the county court acts judicially. A license can not be granted to either the tavern keeper or the merchant except upon certain conditions based upon pre-existing facts, which the court must ascertain. For this reason these two instances were excepted from the general authority conferred upon the county clerk to issue licenses. (General Statutes, chapter 92, article 2, section 9.)

2d. But nevertheless the general laws evidently contemplate that such licenses will be granted to other persons than the tavern keeper and the merchant. They provide for a tax "on a license to a coffee-house keeper" (Chapter 92, article 2, section 4). They require the privilege to be expressed in any license to a "boarding house, restaurant, or other place of entertainment." (Chapter 106, article 4, section 1.)

The licenses not provided for by the general laws are those to be granted by the "authorities of any city, town or corporation," by virtue of special acts. (Chapter 92, article 2, section 11; Acts 1881, page 32.)

The policy of this legislation is manifest. The county court, in the exercise of its judicial powers, can, within certain limitations, grant licenses to persons occupying the responsible positions of merchants or tavern keepers, but beyond this no licenses are provided for except by special acts within the limits

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of cities, towns and corporations, where the privilege can be enjoyed under the surveillance of their constituted officials.

3d. All our general legislation indicates an intention on the part of the law making power to prevent the retail of liquors by all unlicensed persons. If such was not the case, why was it deemed necessary to confer upon distillers, by a special act in the nature of an exemption, the privilege of selling at their residences spirits of their own manufacture, in quantities not less than a quart, not to be drunk on their premises? Or why provide that no license to keep a coffee-house, boarding house, restaurant or other place of entertainment, shall confer the privilege of selling liquor unless so specified in the license? If they could sell without any license it would be absurd to require the licenses for other purposes to also contain this specification.

Although the policy of the law has been to prohibit such sales without a license, yet the General Statutes, as at first enacted, denounced no penalty against unlicensed sales, when the liquor was not drunk on the premises or adjacent thereto, except where made by merchants and tavern keepers (Chapter 92, article 3, section 5). This was characterized by the Court of Appeals in 1881 as "an accountable oversight of the law making department of the government." (Commonwealth v. Wheeler, 79 Ky., 284.)

This defect in the statutes was remedied at a subsequent session of the legislature by the passage of an act declaring that any person who sells without a license shall pay the penalty. (Acts 1883-'4, page 91, section 4.)

4th. What liquors are embraced by the statutes? The General Statutes, as originally adopted, do not seem to have intended to restrict the sales of any liquors, except spirituous and vinous, unless made to minors and known inebriates. The inhibition as to these two classes was not only made more rigid, but was also extended to malt liquors (Chapter 29, article 35, sections 9, 10). Thus the statutes stood until the amendments of 1882 and 1884, by which malt liquors are placed upon

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the same footing with spirituous, except a party is only required to pay a tax of $50 on a license to sell the former, while he must pay $100 for the privilege of selling the latter. But the penalty for unlicensed sales of malt liquors is now the same as in cases of spirituous and vinous liquors (Acts 1883-4, page 91, section 4). These amendments must be construed as authorizing the county courts in licensing merchants and taverns keepers to incorporate the privilege of selling malt liquors also. And all persons other than merchants and tavern keepers, whether they wish to sell spirituous, vinous or malt liquors, must obtain their licenses by virtue of some local or special act, without which the payment of the State tax would be no protection.

5th. The character of sales for which the license must be obtained.

When we consider our statutes as a whole it is manifest the legislature never contemplated taxing any other than the retail dealer. This intention pervades the whole spirit of our laws. It is the interpretation that has been given them by common consent throughout the past. Neither distillers nor wholesale dealers have ever been required to pay either a tax or penalty for wholesale transactions. It is true the statute declares that any person "who shall sell spirituous, vinous or malt liquors" without a license shall pay the penalty, but this must be interpreted with a view to the subject about which the law making power was legislating, viz., retailing liquors. But because the legislature has not imposed a tax upon wholesale transactions is no reason why the wholesale dealer should be permitted to sell by the retail without a license. All persons making retail sales are within the purview of the statutes.

6th. From the foregoing principles we deduce the following conclusions:

1st. A wholesale dealer can sell spirituous, vinous or malt liquor by the wholesale without being liable for the penalty, although unlicensed.

2d. A wholesale dealer can not sell by retail without a license, although the liquor be not drunk on the premises or adjacent thereto.

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3d. Since the amendment of May, 1884, those who sell malt liquors stand under the statute upon the same footing with those who sell spirituous and vinous liquors, except as to the amount of tax to be paid.

The judgment in the case of the Commonwealth v. Rosenbaum is reversed and the cause remanded, with directions to sustain the demurrer to the answer and for further proceedings consistent with this opinion.

The judgments in the two cases of the Commonwealth v. L. Oppenheimer, &c., and Alexander Lowe v. Commonwealth are affirmed.

A. G. Caruth, Helm & Bruce and P. W. Hardin for Commonwealth.

James Harlan and L. T. Moore for Rosenbaum, &c.

NOTES.

That it is often difficult to determine what are the necessaries for an infant the following cases will show: Counsel fees in a bastardy suit are held to be necessaries (Barber v. Hibbard, 54 N. H., 539), and so is a wedding suit (Sands v. Stockton, 14 B. Mon., 232). On the other hand, timber for the house of an infant is not a necessary (Freeman v. Bridger, 4 Jones Law, 1), nor are repairs on the house of an infant (12 Met., 559), nor is fire insurance (Ins. Co. v. Noyes, 32 N. H., 345). Filling the tooth of an infant is a necessary (Strong v. Foote, 42 Conn., 203). A common school education is a necessary, but not a collegiate education (Middlebury College v. Chandler, 16 Vt., —; Turner v. Gaither, 83 N. C., 357; Benchell v. Clary, 3 Brevard, 194). Treats of an undergraduate at college are not necessaries (11 Mees & Wellsb, 67; 152 B., 606), neither are kid gloves, cravats, cologne and walking canes (Le Fills v. Sugg, 15 Ark., 137). The Supreme Court of South Carolina holds that while lodging, clothing, food, medicine and education are necessaries, that liquor, pistols, powder,

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saddles, bridles, whips and fiddles and fiddle strings are not (Saunders, Glover & Co. v. Adm'r Ott, 1 McChord, S. C., 572). "In England a pair of solitaires (or shirt fasteners), worth 25 pounds, are not, it would appear, necessaries for an infant" (Schouler on Dom. Rel., 3d edition, section 411; Ryder v. Wombuell, L. R., 4 Exch., 32). Cigars and tobacco are not necessaries (Bryant v. Richardson, L. R., 3 Ex., 93), nor is a chronometer worth 68 pounds, for a lieutenant in the royal navy (Berolles v. Ramsay, Holt, N. P., 77). A horse may be a necessary for an infant, where he may be directed by his physician to ride for exercise (Hart v. Pratter, 1 Jur., 623). This has been held not to be a necessary in South Carolina (Rainwater v. Durham, 2 Nott & MaC., 524).—Ohio Law Bulletin.

Nonsense—One of the rules of practice of the United States Circuit Court in equity requires the defendant who files a cross bill to pray for process. There is no sense in this, because all the parties are in court, and no process in fact issues. Nevertheless if he omits the prayer for process, they will not entertain his cross bill. Is it not time that courts had done with such meaningless technicalities, which serve only as traps for unwary practitioners or as wasteful nonsense which young lawyers must learn?—American Law Review.

In the chapter on legal proceedings in "John Bull, et ile," the difference between the English and French system in the preliminary examination of a prisoner is well illustrated. It is said: "In England a man who is arrested and informed of the charge brought against him, says, 'you will have to prove it,' and the inspector at the police station tells him: 'I must caution you against making any statement. In fact anything you may say will be used in evidence against you.'

"If in France a man is accused of stealing a watch, the juge d'instruction invariably says to him: 'The best thing you can

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do is to make a full confession;' or, 'you are charged with stealing a watch; prove that you are innocent.' In England the accused person is told: 'You are charged with stealing a watch, you have nothing to say; you shall have to prove it.' "

It is a somewhat curious fact that when Sir Edward Sugden was appointed chancellor of Ireland his wife was inhibited presentation at the Court of the Lord Lieutenant of Ireland, she having been in early life Mr. Sugden's mistress, and, as such, having borne him more than one illegitimate child. Sir Edward immediately resigned the great seal, and the ministry would have fallen in consequence, but that he was prevailed upon to re-accept it, upon the assurance that his wife's youthful indiscretion should be condoned and his own honor vindicated by her acknowledgment at the court of the viceroy. It was not till the death of Sir Edward's oldest, but illegitimate son, without issue, that he would accept a peerage, which such a son could not inherit. All honor to him! These cases are striking instances of the retribution which, sooner or later, is visited upon even the sins of our youth, which David lamented through his whole life.

"So the commander-in-chief rides up," says Michael Sullivan, recounting his own valiant doings in the Crimea—"the commander-in-chief rides up as the army shtood in loine of battle, and he calls out: 'Is Mike Sullivan in the ranks?' 'Here I am, Gineral,' siz I, stepping forward, 'then let the engagement begin,' siz he."

"Luke, is Jim Akers honest?" "Dunno, boss. Jim mout be, an' den agin he moutn't be; but ef I was a chicken, and know'd Jim was about, I tell ye wot, I'd roost high."

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A GREAT LOSS TO THE PROFESSION.

Mr. John Norton Pomeroy died in San Francisco on the 15th of February just past. He was well known all over the country, and was one of the brightest law writers of the age, and at the very head of the class in the United States. He left works on Contracts, Constitutional Law, Code Pleading and Equity Jurisprudence, the latter in three volumes and recently finished. He was, at the time of his death, editor of the West Coast Reporter.

A POINT IN ATTACHMENT LAW IN THE UNITED STATES COURT.

U. S. v. RUTH LILLY.

Circuit Court, Dis. of Kentucky, Dec. 28, 1884.

The defendant obtained a pension from plaintiff upon the allegation that she was a soldier's widow and had not remarried, when in fact she had remarried. The United States brought suit to recover the money as for money had and received, alleging that the pension "was paid by mistake and through the fraud of the defendant," and obtained judgment for the amount. An attachment had been obtained at the commencement of the action upon the ground provided by subsection 2, section 194, Kentucky Code, which permits an attachment in "an action for money due upon a contract, judgment, or award, if the defendant have no property in the State subject to execution, or not enough thereof to satisfy the plaintiff's demand," etc. Held—That subsection 2, section 194, Ky. Code of Practice, does not apply to an action for the recovery of money obtained by fraud, though in form ex contractu, for money had and received.

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NEW BOOKS.

Federal Decisions. Cases argued in the Supreme, Circuit and District Courts of the United States. Arranged by William G. Myer. Vol. VI, Constitution and Laws. Gilbert Book Co., St. Louis, Mo., 1885.

This series has already been noticed by us at length in previous numbers. It is not necessary to do more here than announce the appearance of another volume.

Waples on Attachment and Garnishment. Callaghan & Co., Chicago, 1885.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Adverse Possession—See Entry; Judicial Sale—

Of land for fifteen years—Good title—As appellant and those under whom he holds had the actual, adverse possession of the tract of land claimed by him for more than fifteen years before the commencement of this action, he is not required to show a connected chain of title from the Commonwealth in order to maintain the action. Warmoth v. Fitchen, &c. Same v. Wright, &c. February 28, 1885. Meade Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. C. C. Fairleigh for appellant; Butler & Brashear for appellees.

Agency—See Liquor License—

Conclusiveness of principal's receipt—Where a brother was intrusted by his sister with the entire management of her real estate, a receipt executed by her, reciting that it was in full of all demands of her brother, does not preclude her from compelling him to account for all the money that has come into his hands from the sales and rents of her property, it appearing that she implicitly confided in both the judgment and fidelity of her brother. Laird v. Laird. February 7, 1884. Kenton Ch. Ct. Opin. by Lewis, J., Ct. Ap., aff. on original and cross appeal. W. H. Mackoy, Geo. R. McKee and J. L. Furber for appellant; Wm. E. Arthur for appellee.

Appeals—See Attachments, 1, 5; New Trials, 2—

1. Road cases—Upon appeals from the circuit court in road cases arising under article 1 of chapter 94 of the General Statutes the Court of Appeals has jurisdiction to try only "matters of law arising on the record," and unless the matters of law are separated by the circuit judge from the facts the Court of Appeals can not determine that the judgment appealed from is erroneous. Welch v. Ward, &c. February 11, 1885. Johnson Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. James H. Mollett for appellant.
2. Instructions not excepted to—An alleged error of the court in giving instructions can not be considered, no exception having been taken to any instruction given and no such alleged error relied on as a ground for a new trial.
3. Assignment of errors—That "the court erred in overruling the motion for a new trial" is too general an assignment of error to be considered.

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Daniels v. Carter. February 11, 1885. Pike Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Connolly & Parsons for appellant.

4. To circuit courts—New evidence—In appeals from justices' courts and quarterly courts to the circuit court the same case which was tried in the lower court must be tried again, and no new matter can be brought into the case in the circuit court. Therefore, as consent does not give jurisdiction, the circuit court does not acquire jurisdiction of new matter, either by consent or by the failure of the parties to object.

5. Errors on both sides—Where errors have been committed against both appellant and appellee, which off set each other, the judgment will be affirmed. McCormick v. McCormick. February 18, 1885. Montgomery Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff., Bowden, J., dissenting. H. L. Stone for appellant; Cornelius & Mitchell for appellee.

6. Refusal of county court to take stock in turnpike—No appeal lies to the circuit court from the refusal of the county court to take stock in a turnpike company, and, therefore, no appeal lies from the circuit court to this court in such a case. Lebanon & Pope's Creek Turnpike Road Co. v. Marion County. February 18, 1885. Marion Cir. Ct. Opin. by Ward, P. J., Sup. Ct., dis. Hill & Rives for appellant; S. T. Spalding for appellee.

7. Jurisdiction—Amount in controversy—It is always the judgment against the appellant that determines the jurisdiction of the appellate court. If a plaintiff recovers a part of what he sues for and appeals the judgment is only for that part of his claim upon which the recovery is denied, and if that is less than $100 this court has no jurisdiction of the appeal.

Appellant sued to subject enough of a fund of $175 to pay his claim of $137. The court applied only $94 of the fund to the judgment of appellant's claim, leaving $43 of his claim unpaid.

Held—That the latter amount determines the jurisdiction, and being less than $100 the appeal must be dismissed. Lee v. Gates, &c. February 25, 1885. Fleming Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. Hargis & Eastin and W. H. Cord for appellant; M. M. Teagar, Cassidy & McCartney and E. W. Hines for appellees.

Assignment of errors—See Appeals, 8—

Act repealing—The act of 1884, repealing those provisions of the Code requiring errors to be assigned, only refers to appeals prosecuted since that date. Davis, Gd'n v. Davis, Adm'r. February 18, 1885. Boyd Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. R. C. Burns for appellant; L. T. Moore for appellee.

Attachments—

1. Exceptions—When an exception is reserved to the final order sustaining an attachment, that is sufficient to authorize a review of all the questions necessary to show that the attachment was properly sustained, and it is immaterial that no exception was reserved to the ruling of the court in refusing to discharge the attachment on the face of the papers.

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2. Pleading—The averment that a debtor "is selling and is now trying to sell and dispose of his property with the intent to cheat, hinder and delay his creditors," is sufficient to authorize an attachment under subsection 8 of section 194 of the Code. The omission of the word "fraudulent" before the word "intent" does not lessen the legal effect and meaning of the charge, as every intent to cheat, hinder and delay creditors is necessarily fraudulent.
3. Affidavit—An affidavit for an attachment which does not state the amount the affiant ought to recover is fatally defective.
4. Bond—The clerk has no authority to issue an attachment until the attachment bond is given.
5. Appeal—An appeal does not lie from an order sustaining an attachment unless there is a judgment on the merits. Lynn v. Stark, &c. February 25, 1885. Allen Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Porter & McQuown for appellant; W. E. Settle and Stark & Morehead for appellees.

Bankruptcy—

1. Delay in obtaining discharge—Creditors' rights—Unreasonable delay on the part of a bankrupt in endeavoring to obtain his discharge does not entitle a creditor who has proved his claim in the bankrupt court to maintain an action against the bankrupt therefor. The provision of the bankrupt act, which allows the prosecution to final judgment of an action against a bankrupt, where there has been unreasonable delay on his part in endeavoring to obtain his discharge, applies only to creditors who have not made themselves parties to the proceeding in bankruptcy by proving their claims.
2. Limitation—The twenty-ninth section of the bankrupt act, in so far as it limits the time in which a bankrupt may apply for his discharge to one year from the adjudication of bankruptcy, applies only to cases where no debts have been proved against the bankrupt or no assets have come to the hands of the assignee. Burns v. Burioke. February 11, 1885. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. W. H. Cord for appellant; W. A. Sudduth for appellee.

Bastardy—See Evidence, 4.

Bonds—See Practice in Civil Cases, 6.

Boundary—

1. Processioners—The boundary fixed by processioners is prima facie the true boundary, and in the absence of evidence to the contrary should be so adjudged by the court. Warmoth v. Tobin. February 24, 1885. Meade Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. C. C. Fairleigh for appellant.
2. Evidence—A statement by the owner of land as to where his line is, made to one who has no interest in the adjoining land, does not bind him or his vendees, and may be shown to be incorrect. Warmoth v. Fitchen, &c. Same v. Wright, &c. February 28, 1885. Meade Cir. Ct.

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Opin. by Lewis, J., Ct. Ap., rev. C. C. Fairleigh for appellant; Butler & Brashear for appellees.

Common Carriers—

1. Special contract limiting recovery—A common carrier can not, by special contract, obtain exoneration from loss which is the result of its own negligence or the negligence of its agents, or limit the amount of recovery on account of such loss.
2. Negligence—Lost package—Evidence showing that a package intrusted to an express company for transportation was delivered to the company's street messenger at its destination, and that he did not deliver it at the company's office or show that it was lost, or if so, how lost, was sufficient evidence of negligence to entitle the consignor to recover. To relieve itself of responsibility the company must show that the package is lost, not converted by the company or any of its agents, and that such loss could not have been averted by the care which they ought, under the circumstances, to have exercised.

   Judge Bowden, in a separate opinion, holds that the shipper is not bound by his statement as to the value of the article shipped, where the article is converted by a servant of the company to his use, as the court found was done in this case. Southern Express Co. v. Gutman. February 4, 1885. McCracken Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Bigger & Reid, F. E. Whitfield and T. D. Young for appellant; W. D. Greer and C. S. Marshall for appellee.

Contracts—

1. Of sale—When is title complete—Where money was advanced by a firm under an agreement that it was to be used in purchasing tobacco, which was to be shipped to them, and by them sold, and after the expenses were deducted the proceeds to be applied to the repayment of the advance, it is held that the contract was completed by the delivery of possession of the tobacco to a common carrier to be delivered to the firm advancing the money, and that the purchaser then had no interest in it which could be subjected to the payment of his debts. Hobson & Emery v. Broach, &c. February 11, 1885. McCracken Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. W. D. Greer for appellants; Henry Burnett for appellees.
2. Wife's contract made with husband's knowledge—A petition alleging in substance that the wife of the defendant, with the knowledge and consent of her husband, had delivered to the plaintiff a promissory note, one-third of which was to be for his own use and benefit, which note the defendant, subsequent to his wife's death, had obtained from the plaintiff by promising to pay him therefor a certain sum, states a cause of action for the sum thus promised by the defendant. Adkins v. Cracroft. February 18, 1885. Nicholas Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Ross & Owens and Kennedy & Kennedy for appellant; Throop and John P. Norvell for appellee.

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Corporations—

Dividends—It is only the net gain of a corporation that can in any event be disturbed as dividends. Dividends can in no case be paid out of the capital contributed to, or out of the means necessary to, the conduct of the business. Citizens National Bank, &c. v. Dronillard, &c. February 7, 1885. Campbell Ch. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Benton & Benton for appellants; W. H. McKoy and Thomas McDrugal for appellees.

Courts, Appeals from Justices' and Quarterly—See Appeals, 4.

Curtesy—

Separate estate—While a surviving husband is not excluded from curtesy in the real estate of his wife merely because it was her absolute separate estate, yet he may be so excluded by the instrument which created the separate estate.

A devise by a testator to his daughter and "her bodily heirs, free from the control of her husband forever," is held to exclude the husband from curtesy. Northcutt v. Curry, &c. February 10, 1885. Webster Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Long & Long for appellant; Jno. Elliott for appellees.

Decedent's Estate—See Evidence, 1, 4.

Debtor and Creditors—

Rights of creditors among each other—The mere act of a creditor taking from his debtor a note on a third party upon the condition that he is first to be paid, and that the balance, if any, shall go to other creditors, does not require him to account to them until his claim is paid. Tucker, &c. v. Hume. February 25, 1885. Grant Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Collins & Fenley for appellants; Geo. C. Drane for appellee.

Depositions—

Exceptions as to competency—A general exception as to competency going to the whole of a deposition can not be sustained if any part of the deposition is competent. Walker v. Goodloe's Ex'ors. February 11, 1885. Fayette Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Z. Gibbons for appellant; Bronston & Kincaid for appellees.

Devise—

1. Estate tail—The words "bodily heirs" are appropriate to create an estate tail, but may operate as words of purchase if so intended by a testator, and in such a case may be equivalent to the word "children."

A devise by a testator to his married daughter and "her bodily heirs" is held to create in the daughter an estate for life, remainder to her children, it appearing that the words "heirs of her body" or "her bodily heirs" were used by the testator as to each of his three married daughters to whom he made devises, the devise to one of them being to her and to the heirs of her body "after her." Northcutt v. Curry, &c.

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February 10, 1885. Webster Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Long & Long for appellant; John Elliott for appellees.

2. Construction—Devise over—Right of devisee—A testatrix devised all her estate of every kind to her son, with the provision that if he should "die without issue then living" the estate should go to founding and endowing an orphan asylum. It was further provided that the nominated guardian of the devisee might account to him when he arrived at the age of twenty-one. The son died at the age of twenty-three.

Held—That the devise of the estate over is as full and comprehensive as the devise in the first instance, and carries with it whatever of the estate remained at the death of the son. The provision that the guardian might account to the son when he arrived at the age of twenty-one shows that it was the intention of the testatrix to give her son an absolute right to the use of the personal estate after that time, but from this it does not follow that such of the personal estate as was not consumed by the son in his lifetime should go to his heirs or distributees. Linn's Adm'r, &c. v. Kennedy, &c. February 12, 1885. Keton Ch. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Simmons & Schmidt for appellants.

Entry—

Rights under, as against subsequent intruder—An entry under a defined boundary evidenced by a proper title, whether traceable to the Commonwealth or not, gives to the parties entering the possession to the extent of their boundary, there being no other claimant in possession, and an intruder or trespasser entering within such a boundary for the purpose of asserting a claim of right, having no other title than a mere possession, can hold only to the extent of his inclosure. Cameron v. Beatty, &c. February 5, 1885. Jefferson Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., aff. J. R. M. Polk for appellant; J. F. Bullitt, Sr., J. F. Bullitt, Jr., and E. W. C. Humphrey for appellees.

Estoppel—

Delay in asserting lien—Where a vendor's lien is of record mere delay upon his part will not estop him from asserting his lien, he having done nothing to induce a reasonable belief that he was not claiming it. Medley v. McElroy. February 21, 1885. Marion Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. E. & S. A. Russell for appellant; Knott & Spalding for appellee.

Evidence—See Boundary, 2—

1. Suit against decedent's estate for services rendered—Will as evidence—In an action against the estate of a decedent to recover for services rendered the decedent, the liability of the decedent for any amount and also the value of such services being in issue, it was competent to show that the decedent wrote several wills, subsequently destroyed, containing admissions that he was indebted for the services rendered, and also competent to show the value of a tract of land devised by one of the wills to the

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plaintiff as evidence of the decedent's estimate of the value of the services, and the amount he was willing to pay therefor.

2. As to value of services—The court properly refused to allow witnesses to state for what price they would have performed the services performed by the plaintiff for the decedent during a long sickness, and also properly rejected testimony showing the price at which the decedent might have been waited on and cared for in a large city.
3. Transaction with decedent—A person may testify for himself concerning a transaction with a decedent where one interested in the estate of the decedent has testified as to the same matter. Holiday's Adm'r v. Watson. February 19, 1885. Mason Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. T. C. Campbell, E. L. Worthington and Barbour & Cochran for appellant; W. Lindsay and Harry Wadsworth for appellee.
4. Transactions with decedent—The mother of a bastard child, the putative father being dead, is not a competent witness to establish a claim of the child against the estate of the father, based upon a contract alleged to have been made by the father with the mother for the support of the child. Stower's Adm'r v. Hollis, By, &c. February 4, 1885. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Thomas Joyes for appellant; James Harris and L. N. Dembitz for appellees.

Execution Sale—

Time allowed to redeem the land—Several different tracts of land were sold under as many successive executions issued on the same judgment. The plaintiff in the several executions, who was the purchaser at each of the sales, agreed with the defendant to give him time to redeem the land upon the payment of a certain amount and his promise to borrow the money and pay the balance in a few days. The defendant having failed to comply with his promise, in an action by the purchaser to recover the several tracts of land, the sheriff having executed to him a conveyance therefor, it is held that he is entitled only to a lien upon the several tracts for the amount of his bids, and it was error to award to him a writ of possession for anyone of the several tracts, his agreement to give the defendant time to redeem extending to all the tracts sold. Layne v. Weddington. February 12, 1885. Floyd Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. T. R. Brown for appellant; Weddington & Gobel for appellee.

False Imprisonment—

Necessary averment—In an action against a justice of the peace for false imprisonment on the charge of contempt, the failure of the plaintiff to allege that the justice had no jurisdiction in the matter rendered his petition fatally defective. Parker v. Hamilton, &c. February 24, 1885. Jefferson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. John Stites for appellant.

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Forgery—

1. Necessary allegations of indictment—An indictment for forgery is sufficient which charges that the defendant "did unlawfully, willfully and feloniously make and forge a promissory note for the payment of money," which is set out in full, "without authority and with intent to defraud" the person whose name was forged, which is equivalent to charging that he falsely and fraudulently made the note.
2. Evidence—Under an indictment for forgery it is not indispensable to prove that the name forged is in the handwriting of the defendant. Resort must necessary be had in nearly every case to other facts and circumstances to show that the name of the obligor is falsely signed. Holdsworth v. Commonwealth. February 21, 1885. Hardin Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. James E. Gaither and James Montgomery for appellant; P. W. Hardin for appellee.

Fraudulent Conveyance—

1. Surety—A surety may maintain an action to set aside as fraudulent a conveyance by the principal, the creditor being made a party defendant.
2. Badges of fraud—A conveyance from sister to brother is held to be fraudulent, the sale of the property for much less than its value, the retention of possession by the grantor without the payment of rent, and the pecuniary condition of the grantee being recited as badges of fraud. Johnson, &c. v. Harrison, &c. February 7, 1885. Daviess Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Owen & Ellis for appellants; Little & Slack for appellees.
3. Return of "no property"—When necessary—A suit to set aside a conveyance as fraudulent can not be maintained without first having obtained judgment at law and execution with return of no property unless there is a failure to object in the court below, by demurrer or otherwise, to the exercise of jurisdiction, but it is immaterial whether the objection is by demurrer or by answer. It is only necessary that the objection should be of such a character as to notify the court that jurisdiction is not conceded.

The denials of the defendant in his answer that the plaintiff "has any right in this action to attack his title and have it declared void" is held, in this case, to be sufficient to show that jurisdiction is not conceded. Hill v. Cannon, &c. February 24, 1885. Todd Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. A. Duvall and B. T. Perkins, Jr., for appellant; H. G. Petree for appellees.

4. No one acquires any rights under—A transfer of property for the purpose of defrauding creditors is illegal, and neither the grantors nor the grantee can have any standing in a court of equity under such a contract. Kingsbury v. Haswell, &c. February 11, 1885. Breckinridge Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Lewis & Fairleigh and Stuart & Atchison for appellant; G. W. Williams for appellees.

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Frauds, Statute of—

Promise to answer for another's debt—Appellant sent to appellees, merchants, whose note he held, orders drawn upon him by a third person, whom he owed, with direction to appellees to pay them, promising to give appellees credit therefor on their note.

Held—That this promise was not within the statute of frauds. Melvin v. Hawk & Bro. February 18, 1885. Rockcastle Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. G. & L. B. Carter for appellant; Isaac A. Stewart and John K. McClary for appellees.

Guaranty—

1. Letter of credit—Notice of default—Demand of payment—A letter of credit is a continuing guaranty, and the guarantor is not entitled to notice from the creditor of the debtor's default or to demand of payment.
2. Extension of credit—Effect on guaranty—Where in consideration that A will sell B certain merchandise, C agrees to pay any deficiency not exceeding a stated sum that may be due by B at the time of settlement, and in making the sale A does not fix any definite time when the goods are to be paid for further than that B is to pay as soon as he could make collections from his business. But before payment was made B concluded to quit business and gave his note to A for sixty and ninety days for the amount due on the sale. Held—C is not released from his guaranty by A's accepting the notes. The debtor and creditor had the right to fix the length of credit and time of settlement. Emerson, Fisher & Co. v. Dye, &c. February 5, 1885. Kenton Cir. Ct. Opin. by Holt, J., Ct. Ap.; rev. Hallam & Perkins for appellants; Nelson & Washington and R. H. Gray for appellees.

Guardian and Ward—See Sureties, 1, 2.

Homestead—

1. Waiver by claiming dower—By proceeding to have dower assigned and not insisting upon the allotment of homestead appellant waived any homestead right she may have had, and thereafter held a life estate in the property assigned to her as dower. In this she was entitled to a homestead, not in the right of her husband's occupancy and ownership, but in her own right as by purchase, but whether held in her own right or in the right of her husband she forfeited it by abandonment, all her children having reached their majority when she left it.
2. Abandonment, what constitutes—While it is impossible to lay down an absolute rule as to the amount or character of evidence that will establish the fact of waiver or abandonment of a homestead, in cases where rights intervene after the actual occupancy of the claimed homestead has ceased, the court should incline the more strongly to the conclusion that there was a present intention on leaving to remain permanently away.

In this case, appellant left her homestead in the country and removed to town, where she rented property and kept house with some of her children for more than five years, and then returned to her farm after it had

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been sold under execution for debts contracted by her during her absence. Although there were some facts which showed an intention to return, it is held that she must be deemed to have abandoned her homestead. Burch v. Atchison, &c. February 19, 1885. Marion Circuit Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. John W. Galloway for appellant; Mitchell & DuBose for appellees.

Husband and Wife—See Contracts, 2.

Injunctions—

1. To restrain judgment—The court improperly sustained a demurrer to a petition by appellant seeking to enjoin the collection of a judgment obtained against him by appellee, appellant alleging that he had paid appellee a certain amount on the judgment, for which no credit had been given, and that a levy and sale of his property to pay this sum, as part of the judgment, would follow unless prevented.

2. Petition must state facts definitely—An injunction being a harsh remedy, should not be granted except upon positive averments of the equities on which the application is based.

In an action to enjoin the collection of a judgment, an allegation that the plaintiff "had" certain demands, "just and sufficient to satisfy said judgment," is not sufficient to authorize an injunction, as there is nothing to show that they did not exist before the judgment was rendered, and in that action might have been pleaded as a set-off. Hunter v. Bertram. February 25, 1885. Clinton Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. A. Brent for appellant.

Insurance—

Levy of execution on the property—Effect on policy—The levy of an execution upon personal property is not such a change in the title or possession as will render void a policy of insurance upon the property, which provides that "if the property be sold or transferred, or any change take place in title or possession," the policy shall be void. The possession of the sheriff under the levy is but a qualified possession, and in no way opposed to a possession by the execution debtor so far as necessary to preserve the property from spoliation or destruction. Western Assurance Co. v. Layer, &c. February 25, 1885. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. R. W. Woolley for appellant; Junius Caldwell and A. A. Stoll for appellees.

Judgments—See Injunctions, 1, 2.

Judicial Sale—

Of land in adverse possession, set aside—A sued B on a note executed for the purchase price of land sold him by C, who united as a plaintiff and averred his ability to make good title; but, pending the suit, C suffered judgment to go against himself in favor of D, who obtained an order for the sale of the land, bought in and had the sale confirmed, and ousted B

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from the possession. While B was out of possession a sale of the land was made in this case to satisfy A's note and lien for the purchase money. Held—This latter sale should be set aside and a resale ordered to be made when B recovers possession. Kelly v. Broadus. February 5, 1885. Estill Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. J. B. White and H. W. Gardner for appellant; H. C. Lilly & Son for appellee.

Liens—See Vendor and Vendee.

Limitation—

1. Adverse possession—Under patent—Limitation may be pleaded against one claiming under a patent issued by the State after the possession of the defendant had ripened into a perfect title. Cameron v. Beatty, &c. February 5, 1885. Jefferson Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., aff. J. R. M. Polk for appellant; J. F. Bullitt, Sr , J. F. Bullitt, Jr., and E. W. C. Humphrey for appellees.
2. Fraud—This action, to recover for the fraudulent suppression of a will and the conversion of property devised by it, was barred by limitation after five years from the time the plaintiff became of age, and although the plaintiff did not discover the fraud until just before the bringing of the action, it is barred, more than ten years after the plaintiff's majority having elapsed before the action was brought. Nor does the fact that the defendant was the plaintiff's guardian prevent limitation from running, as the alleged liability did not arise from the guardianship, and was not connected with it. Pool, &c. v. Allinsworth. February 19, 1885. Christian Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Petrie & Littell and J. W. Downer for appellant; Phelps & Son and John Feland for appellee.

Liquor License—

Sale of liquor by agent—The principal is liable for the act of his agent in selling liquor without license, where the agent, although without specific instructions, is acting at the time within the scope of his employment. Humphries v. Commonwealth. February 4, 1885. Christian Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Henry & Payne for appellant; James B. Garnett and P. W. Hardin for appellee.

Mechanics' Lien—See Pleading, 8—

What steps necessary to perfect—The lien given by statute to mechanics, laborers and material men is dissolved unless the claimant, within sixty days after he ceases to labor or furnish material, files in the office of the county court clerk the statement required by the statute, and if this statement is filed in the prescribed time the lien is nevertheless dissolved unless an action to enforce the lien is brought within twelve months from the day of filing the account. These are not statutes of limitation to be pleaded in bar of the action, but are limitations beyond which the lien does not extend. The petition must allege the facts necessary for securing a lien, which necessarily include facts showing a

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personal liability. Yeiser v. Todd, &c. February 11, 1885. Franklin Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. D. W. Lindsey for appellant; Hugh Rodman for appellees.

Negligence—See Common Carriers, 1, 2; Personal Representatives, 3; Railroads, 1.

New Trials—

1. Upon payment of costs—An order granting a new trial upon the payment of all costs is valid to the extent of requiring the payment of the cost of the former trial, and must be read as if it required only that.
2. Granted on terms—When a party asks for a new trial and accepts it on prescribed terms permitted by law, and the order is set aside under power conferred by statute, because the terms have not been complied with, this court can not consider whether, under the circumstances, the terms should or should not have been prescribed.
3. Judgment on failure to pay costs—The statute authorizing the court to render judgment on the verdict at the next term where a new trial has been granted upon payment of costs, and the costs have not been paid as ordered, was not intended to authorize the rendition of a judgment which the verdict was not sufficient to support.

   In an action to recover possession of several mares, among which was a light bay mare, and to recover damages for their detention, a verdict of $200 "for the light bay mare and her detention" was not justified by the issue. The verdict did not give to the plaintiff the mare and also $200 for her detention, but was in effect that the mare belonged to the plaintiff, but that the defendant should have her by paying $200, the aggregate of her value and of the damages for detaining her. Ritchie v. Groves. February 18, 1885. Adair Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. H. C. Sandidge for appellant; Montgomery & Jones and James Garnett for appellee.
4. Action for new trial—Evidence—Witnesses—Whether an action for a new trial under section 344 of the Code is to be equitable or ordinary must depend upon the character of the original proceedings in which the new trial is sought, and the competency of the witnesses to be introduced in such an action must be determined by the same provisions of the Code which determine the competency of witnesses in other actions. Therefore, if the action be an equitable one, a party can not testify for himself in chief after taking other testimony for himself in chief; the action of the court, however, in admitting the plaintiff's testimony for himself in this case was not prejudicial, as the other testimony was sufficient to entitle him to a new trial. Wallace's Adm'r v. Pigg. February 25, 1885. Lawrence Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. W. C. Ireland, James E. Stewart and R. T. Burns for appellant; Alexander Lackey for appellee.

Partnership—

Powers of partners—In mercantile partnerships each partner is presumed to have authority to bind the firm by the use of its name upon bills of exchange and promissory notes, and stipulations among the partners that

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one or more of them shall not have this right will not affect third parties unless made known to them. Nor will the fact that the bill or note was made for purposes not within the partnership business affect the party taking it unless he had notice of the fact. Jones' Adm'r v. Rigney, &c. February 11, 1885. Casey Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Adams, Clark & Belden for appellant; Stone & Stone for appellees.

Personal representatives—

1. Interest—Commissioner's settlement—Presumption—Where a commissioner's report of settlement with administrators stated the aggregate amount of each note collected by them, without saying how much interest was collected or when the notes were due or paid, the presumption must be indulged that interest was charged to the adminstrators on these notes, and they can not be made to pay double interest by being compelled to pay to the widow interest on her distributable share.
2. Credit for expenses of litigation—The court properly refused to allow administrators credit for sums expended by them in attempting to enforce the terms of a contract by which the widow agreed to take a child's share in lieu of her distributable share and dower, the contract having finally been set aside as fraudulent. Corbett v. Johnson's Adm'r. February 5, 1885. Warren Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. on original and cross appeal. John W. Galloway for appellant; Wright & McElroy for appellee.
3. Negligence, liability for—In the absence of bad faith on the part of a personal representative, where he receives compensation for his services as in this State, he is held to such care in the management of the estate as a competent person who would ordinarily exercise under the same circumstances in reference to his own affairs.

   The failure of an administrator to sell slaves belonging to the estate under a decree rendered in February, 1864, directing him to sell, in his discretion, such of the slaves as were necessary to pay the debts of the estate, is held not to render the administrator liable on the ground of negligence, the war between the States and the existing condition of things having rendered slaves of no marketable value. Messmore, &c. v. Stone's Adm'r. February 26, 1885. Hancock Cir Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. on original and cross appeal. W. Lindsay for appellants; W. P. D. Bush and G. W. Williams for appellee.

Pleading—

1. Defect cured—A defect in substance in a petition can not be impliedly cured by mere pleading over thereto. The answer must expressly admit or allege the matters which should have been alleged in the petition. Parker v. Hamilton, &c. February 24, 1885. Jefferson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. John Stites for appellant.
2. Non est factum—A plea of non est factum must be an affirmative one. It is not sufficient to allege a want of knowledge or information as to

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the execution of the instrument in question. Dugan's Adm'r v. Harris' Adm'r, &c. February 26, 1885. Daviess Cir. Ct. Opin. by Holt, J., Ct Ap., aff. G. W. Williams and Eli H. Brown for appellant; W. N. Sweeney & Sons for appellees.

8. Exhibits—Exhibits can not take the place of pleaded allegations.

In a petition to enforce a mechanic's lien the only averment that the plaintiff did any work or furnished any material is that "he did perform his contract with defendant as set out in said itemized account," the account or statement being filed as an exhibit and copied into the petition. There being no allegation that the items in the statement or account are correct, but only an averment that the plaintiff filed such a statement in the clerk's office, it can not supply the place of the omitted allegations that the plaintiff did the work and furnished the material for which he seeks to recover. Yeiser v. Todd, &c. February 11, 1885. Franklin Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. D. W. Lindsey for appellant; Hugh Rodman for appellees.

4. Construction—In construing a pleading inferences in favor of the pleader are not to be indulged. Pottingen v. McLure. February 18, 1885. Warren Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Halsell, Mitchell & Potter for appellant; Williams & Sims and E. W. Hines for appellee.

5. Denials—Making an issue—Affirmative allegations of an answer which are not the statement of new facts, but simply a contradiction of what the plaintiff has previously alleged on the same subject, do not require a denial in the reply in order to constitute an issue. Adkins v. Cracroft. February 18, 1885. Nicholas Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Ross & Owens and Kennedy & Kennedy for appellant; Throop and John P. Norvell for appellee.

Pleading and Practice in Criminal Cases—

Reversible error—In felony cases where there is any evidence to go to the jury tending to establish guilt, this court can not consider whether the penalty is too light or too severe. Duke v. Commonwealth. February 19, 1885. Carroll Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. McElrath & Smith and Winslow & Winslow for appellant.

Practice in Civil Cases—

1. Defense by one defendant for all—Where, in the settlement of a trust estate, there were several classes of creditors who were antagonistic to each other, and two of one class were appointed to defend for all the creditors, a creditor of another class, who subsequently entered his appearance, was not bound by what the court had decided when he was represented by parties whose interests were antagonistic to his. Citizens National Bank, &c. v. Dronillard, &c. February 7, 1885. Campbell Ch. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Benton & Benton for appellants; W. H. Mackoy and Thomas McDrugal for appellees.

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2. Refusal to transfer to equity—An action for the breach of a sheriff's county levy bond having been properly brought in a court having only common law jurisdiction, the refusal of the court to subsequently transfer the action to equity so that the chancellor, with the aid of his commissioner, might correct certain alleged mistakes made by the sheriff in his various settlements, was not prejudicial to the defendants, it appearing that every account and transaction was as carefully considered and reported by a commissioner, and passed upon and decided by the judge, as if the action had been tried and decided by the chancellor. Mullins, &c. v. Pendleton County Court. February 14, 1885. Pendleton Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. C. H. Lee and A. Duvall for appellants; A. R. Clarke for appellee.

3. Premature judgment—This action having been submitted simply upon exceptions to the master's report, it was error to render judgment dismissing the plaintiff's petition.

4. Transferring case to equity—As this action was begun in equity and prosecuted by equity methods without objection, it is too late to make that objection when an adverse report has been returned; but if it is not too late, then the objection can not be made by exceptions to the report. There must be a motion to transfer to the ordinary docket. Campbell's Adm'r v. Miller. February 18, 1885. Russell Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Hays & Stone for appellant; J. F. Montgomery for appellee.

5. Action to recover personal property—Plaintiff's bond insufficient—Defendant's bond will be canceled—Error to dismiss petition—When in an action for the recovery of personal property the plaintiff has executed bond in order to get possession, and the defendant in order to retain possession has given the same security, if the plaintiff's bond was insufficient when given, or has become insufficient, he should be required to give proper security, and if he fails to do so the defendant's bond, required merely because it is presumed the plaintiff's bond is good, should be canceled. It was error in this case to dismiss the plaintiff's petition because of his failure to give proper security. Ratliff v. Fannin. February 25, 1885. Elliott Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. R. Botts for appellant; J. W. & J. B. Hannah for appellee.

Process—

Service on infant who has no guardian—The Code of 1854 required a summons to be served on an infant under fourteen years of age, by delivering a copy to the infant and also a copy to the guardian, parent or other person having the infant under charge, and an administrator having no more control over the infant than to pay for his board and schooling did not have such control as was contemplated by the Code for the purpose of service of process. Therefore, where suit was instituted by the administrator having only such control, service upon the infant alone was not sufficient, although there was no guardian and no parent. Mess-

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more, &c. v. Stone's Adm'r. February 26, 1885. Hancock Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. on original and cross appeal. W. Lindsay for appellants; W. P. D. Bush and G. W. Williams for appellee.

Railroads—

Injury to passenger riding in express car—If the manager of a train know that a passenger is in an exposed and improper place on the train it is their duty to forbid him to remain there, and if they do not and injury occurs the company should be held responsible.

In this case an express messenger not on duty, who, under the contract of his principal with the railroad company, was at such times to be regarded as a passenger, while riding in an express car was killed by a collision which did not wreck the passenger cars or injure any of the passengers in them. The baggage master, who, by an agreement with the conductor and with the consent of the company's superintendent, had the control of the express car, knew of the decedent's presence there and did not forbid it.

Held—That the railroad company is liable. Ky. Central R. R. Co. v. Thomas' Adm'r. February 14, 1885. Harrison Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. O'Hara & Bryan for appellant; J. Q. Ward and C. W. West for appellee.

Receipts—See Agency—

As evidence—While a receipt from a woman to her confidential adviser in whom she placed unbounded confidence should be closely scanned, it prima facie establishes payment, and unequivocal testimony is necessary to overturn it. Dugan's Adm'r v. Harris' Adm'r, &c. February 26, 1885. Daviess Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. G. W. Williams and Eli H. Brown for appellant; W. N. Sweeney & Sons for appellees.

Sales of Personal Property—See Contracts, 1.

Separate Estate—See Curtesy—

Liability for improvements—Verbal contract—The separate estate of a married woman may be subjected to pay for improvements made thereon upon the faith of a verbal contract with her, the credit having been given her on account of her separate estate. In order to subject her separate estate it is not necessary that the contract should be in writing, or that her husband should unite in it. Pfleeger v. Stiver. February 11, 1885. Kenton Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Tisdale & Theissen for appellant.

Sheriff—

Liability on county levy bond—Allegations of petition—Where a sheriff and his sureties on his county levy bond are proceeded against under section 9 of article 8, chapter 27, General Statutes, it is not necessary to allege anything more than that a settlement was duly made between the sheriff and the commissioner appointed by the county court, and that from the report of settlement it appeared that the amount of money sued for was in

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the hands of the sheriff, due the county, and that payment has been demanded by the receiver appointed for the purpose. It is not necessary to allege that the defendants were indebted to the plaintiff in the amount found due upon the settlement. Mullins, &c. v. Pendleton County Court. February 14. 1885. Pendleton Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. C. H. Lee and A. Duvall for appellants; A. R. Clarke for appellee.

2. In action against deputy—Necessary allegations—In order that a sheriff may recover upon his deputy's bond for the failure of the deputy to collect and pay over the taxes listed and placed in his hands he must allege and show that he is legally accountable for, or has actually accounted for, the taxes which he seeks to recover from the deputy and his sureties.

3. Liability of deputy for uncollected taxes—A sheriff, having taken tax lists out of the hands of his deputy while there was yet a balance due upon them, can recover from the deputy and his sureties only the taxes that could have been collected by the deputy while in office, and were not collectible at the time of his removal, together with such damages as the sheriff may have sustained by reason of the delay in collecting, or additional expense of collecting, if it was worth, and cost, more to collect the remnant than the fees allowed by law therefor. Bowen, &c. v. Shewmaker's Adm'rs. February 25. 1885. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. J. W. Lewis, A. Duvall, W. C. McChord and D. W. Lindsey for appellants; W. E. &. S. A. Russell for appellees.

Street Improvements—

Alley—Apportioning cost—The cost of improving an alley must be equally apportioned among the owners of the whole square. The only exceptions to this rule that has ever been recognized is where the alley lies wholly within one of the quarter sections. Connelly, &c. v. Shadburne. February 25, 1885. Lou. Ch. Ct. Opin. by Richards, J., Sup. Ct., aff. Elliott & Hemingray for appellants; Samuel B. Richardson for appellee.

Sureties—See Fraudulent Conveyances, 1—

1. Of guardians—A guardian resigned his trust under an agreement with his successor, whom he had appointed, that he was to have one year within which to settle his accounts and pay over the ward's money to the new guardian.

Held—That the contract was against public policy and void, and, therefore, did not injure the sureties of the former guardian, as it did not prevent any legal steps by them for their protection.

2. Release by failure to sue—In the absence of the statutory notice a surety in a guardian's bond is not released by the failure to sue until his principal and co-surety have become insolvent. Buckler v. Bromel, &c. February 11, 1885. Robertson Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. W. Buckler and W. W. Kimbrough for appellant; A. Duvall and B. G. Willis for appellees.

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3. Contribution—Suit having been instituted by S. upon a note executed to him by Y. as principal and B. as surety, it was agreed that Y. and his father would give their note in lieu of the note sued on, thereby releasing B., provided S. would consent, which he did. After the new note had been signed by Y. and his father turned to B. and asked him to sign also, which he did.

Held—That B. thereby voluntarily abandoned the agreement for his release, and, having paid one-half the new note, can not look to the father of Y. for protection, the father being as to B. a co-surety, and not a principal. Bradford v. Yelton. February 25, 1885. Pendleton Cir. Ct. Opin. by Richards, J., Sup. Ct., aff., Bowden, J., dissenting.

Taxation—

Board of equalization—Its powers—The act of the legislature, entitled "An act to equalize assessments for revenue purposes, and to provide for a State board of equalization," was not intended to apply to taxes on the value listed under the equalization law (which will be paid as if the board had never assembled), but to the increase or decrease made only on the land and the classes of personal property valued by the assessor and enumerated in the statute. Barbour, Sheriff v. Goodloe. February 5, 1885. Lou. Ch. Ct. Aff. by equal division of court. Opin. by Pryor, J., Ct. Ap., Holt, J., concurring. Helm & Bruce for appellant; John Roberts for appellee.

Usury—

Necessary allegations to recover—In order to authorize the chancellor to purge a claim of usury it is not necessary that usury should be charged in express terms; it is sufficient if facts be stated showing it to exist.

An allegation that a note given in renewal of another was taken for too much, by fraud or mistake, is held to be sufficient to warrant proof of usury and to authorize the chancellor to prevent its collection. Walker v. Goodloe's Ex'or. February 11, 1885. Fayette Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Z. Gibbons for appellant; Bronston & Kincaid for appellee.

Vendor and Vendee—See Estoppel—

Rescission—Lien—Rent—A vendor sold two tracts of land, conveying one and agreeing to convey the other as soon as title and possession could be obtained, but failing to obtain the title to the latter tract the entire contract was rescinded by the parties. Upon a settlement, which included rent for both tracts, the vendor was found to be indebted in a small sum to the vendee. Subsequent to the adjustment the vendee was compelled to pay rent to a claimant of the tract which was never conveyed.

Held—That the vendee is entitled to a lien on the tract conveyed to him not only for the amount found due him upon setltement, but for the amount of the rent he was subsequently compelled to pay. Caldwell, &c. v. Rainey. February 12, 1885. Mercer Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. on original and rev. on cross appeal. Durham & Jacobs for appellants; A. Duvall and Bell & Wilson for appellee.

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Verdicts—

The entire verdict of a jury must be in writing, and the verdict as written can not be supplemented or in any manner affected by an oral declaration of the jury.

The verdict: "We, of the jury, find for the plaintiff 280," read by the foreman when the jury returned it into court "two hundred and eighty dollars," is held to be too indefinite to support a judgment, and a new trial is awarded. Nave v. Collier, &c. February 4, 1885. Garrard Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. W. O. Bradley for appellant; Burdett & Walton and Denny & Tomlinson for appellees.

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The Kentucky Law Reporter

EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
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NOTES.

The highest judicial salaries paid by the States are in New Jersey and Pennsylvania, which each pay their chief justice $8,500 per annum and his associates $8,000; the lowest salaries are in Oregon, which pays chief and associates alike, only $2,000. Of the circuit judge's salary, New Jersey leads, paying $8,000, and Virginia comes last with only $1,600. Eight States pay the circuit judges a salary equal to the Supreme Court judges. All but eleven States pay their chief justice and his associates equal salaries, making no discrimination between them.

The late Vice-President Colfax is quoted as having said that when Chief Justice Taney died in 1864, Mr. Lincoln wished to appoint Wm. M. Evarts to the place, but was prevailed upon by a strong sentiment in congress, the newspapers and among the people to give the position to Mr. Chase, who had just resigned the secretaryship of the treasury. Mr. Lincoln said: "I am satisfied that it is the wish of a large majority of my supporters that I should appoint Mr. Chase, and I intend to do so, although I think myself that William M. Evarts is, by his legal attainments, the fittest man for the place."

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A Mrs. Mack has recently proved too sharp for the lawyers. She was convicted of the murder of her husband and sentenced to imprisonment for life, but on appeal the case was reversed and a new trial ordered. She took advantage of this to marry the chief witness for the prosecution, thereby sealing his lips and stopping all further proceedings against her. The adroitness of Mrs. Mack is as admirable as the courage of the new successor of Mr. Mack.

There is an additional form of insanity which it is claimed should be accepted as a defense to crime. It is called uncontrollable impulse and exists "without impairing the capacity of distinguishing right from wrong, and of knowing the quality of the wrongful act about to be performed, yet overpowers or supersedes the will so that the subject has no power to restrain himself." If such a plea is to be listened to it should be after conviction, and before a medico-legal board organized to inquire into the mental history and condition of the prisoner, and should its conclusion be favorable to him a pardon or modification of the sentence to be granted or commitment ordered to an asylum, as the facts might justify.

A woman living in Paris wanted a divorce from her husband who was mistreating her. But it happened that he was a German who had never been naturalized in France, though he had been living there many years. It is a principle of the French law that the courts shall decline jurisdiction of a controversy between foreigners unless they both consent, and as the husband refused to plead the court was obliged to dismiss the complaint. The injured woman then took her case into the German courts, but there they said the husband having left Germany he was no longer subject to its laws, and its courts could do nothing for her. She had married a man without a country.

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Is there any way of preventing the passage of inaccurately drawn and hastily enacted laws by the legislature? The procedure adopted by the English Parliament for this purpose is admirable. Local or private bills are no longer regarded as legislative acts proper, but as petitions for immunity or for special privileges which are to be tried before a parliamentary committee in much the same way as a case in court. Such bills must be filed sixty days before the matter can be considered; they must be lodged in a specified office and advertised in the daily journals; then on a fixed day the bill comes before a designated committee, when counsel for the bill, counsel against it representing any opposing private interest, and, if the public is affected, counsel for the ministry are heard in full. In this way notice is given to all, the merits of the bill fully considered from all standpoints, and, besides, each clause is passed in review by trained minds on the alert to protect the interest entrusted to them, and to discover any latent imperfection or obscurity in the language of the bill, and to make its words apt to grant those rights intended to be granted, and no more. We ought to have some such mode of procedure in this State.

The habeas corpus act was carried by an odd artifice in the House of Lords. Lord Gray and Lord Norris were named to be the tellers. Lord Norris being a man subject to vapours, was not at all times attentive to what he was doing; so a very fat lord coming in, Lord Gray counted him for ten, as a jest at first, but seeing Lord Norris had not observed it, he went on with his misreckoning of ten. So it was reported in the house, and declared that they who were for the bill were the majority, though it indeed went on the other side. And by this means the bill was passed.

"In the days of the Tudors and Plantagenets there were at least sixteen different kinds of juries adapted to different

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classes of questions. There was a jury of peers for the trial of a peer, and a jury one-half of aliens where a party to the suit was an alien, a grand assize, selected of gentry, knights and commoners, where titles, landed estates, seigniorages and dignities were in question, and a jury of peddlers and hucksters in the piepoudre, where a huckster tricked in weights or cheated in his coins; a jury of women where pregnancy with an heir was to be determined, and a jury of clerks where the legality of court fees was disputed; a jury of priests, where a man had pleaded benefit of clergy, and several other juries still in addition to our present grand and petit juries. Our jury system has shrunken in variety and flexibility simultaneously with the expansion in popular prerogatives, very much as the Frenchman found that the art of cooking had collapsed in America with the multiplication of religious sects. "Mon dieu," said he, "what a country, with a hundred different religions and only one gravy! How much happier in France, with one hundred and fifty different kinds of gravy and only one religion!" So an Englishman of three centuries ago could say: "In our day we had few rights, but we had juries adapted to secure them. Now you have millions of nominal rights, while your single jury is as clumsy and imperfect a means of securing them as an Egyptian brace of crossed sticks were of plowing," which if held up on one end and drawn by an ox was a plow; if laid down on one side was a harrow, and if used without an ox was a hoe. The English provision that none should be jurors but householders and freeholders should be restored, or by some equivalent provision persons of reasonable competency as business men should be secured."—Mr. Denslow before the Illinois Bar Association.

THE MAN WHO LAUGHS.

A good story is told of the late Chief Justice Cockburn. He was once counsel for the plaintiff in a certain case, and a Mr.

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B—— was for the defendant. Cockburn called a witness, and proceeded to examine him. "I understand," he said, "that you called on the plaintiff, Mr. Jones; is that so?"

"Yes," replied the man.

"What did he say?" demanded Cockburn.

Mr. B —— promptly rose and objected. The conversation could not be admitted as evidence. But Cockburn persisted, and Mr. B —— thereupon appealed to the judges, who, after a time, retired to consider the point. They were absent for nearly half an hour, and when they returned they announced that Mr. Cockburn might put his question.

"Well, what did he say?" asked counsel.

"Please, sir, he wasn't at home," replied the witness, without moving a muscle.

A health journal says that to retain health a person ought to lie on the right side. Yes, but which is the right side? Every lawyer in the country thinks the side he is lying on is the right side.

"Guilty or not guilty?" sharply said an assize judge the other day to an inattentive female prisoner in the dock. "Just as your honor pleases. It's not for the likes o' me to dictate to your honor's worship," was the reply.

Some people are too trusting for this world. At a recent trial the prisoner entered a plea of "not guilty," when one of the jury put on his hat and started for the door. The judge called him back, and informed him that he could not leave until the case was tried. "Tried!" cried the juror, "why he acknowledges that he is not guilty!"

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Lawyer—I have lost my portmanteau.
Traveler—I pity your grief.
Lawyer—All my briefs were in it.
Traveler—I pity the thief.

NEW PROMISE UNDER THE KENTUCKY STATUTE OF LIMITATION.

It was a remark of Lord Erskine that the only safe thing for a debtor to do (whose debt had been barred by the statute of limitation) when his creditor approached him was to "knock him down," otherwise some word or expression carelessly let fall by the debtor would be construed into a new promise to pay the debt, so strong was the disposition of the English courts at that time to override the statute and enforce a debt, notwithstanding the lapse of time, wherever it appeared that it had not been paid.

But in this State, on the contrary, an examination of the cases shows that the Court of Appeals, from the very first, set itself against the English doctrine, and after the debt had been once barred required very strong evidence of a new promise in order to revive it.

The cases upon the subject are singularly uniform and harmonious, notwithstanding that many of them were decided while Chief Justice Robertson was on the bench, and they had to undergo his well known disposition to refine, limit, modify, overrule and legislate. They establish—

(1). Where the period fixed by the statute as a bar has run out the debt can not be revived except by an express new promise, or, if not a promise, an unqualified acknowledgment of the debt as still subsisting (notwithstanding the bar), from which the law will imply a promise. Thus the following acknowledgments were held sufficient: Defendant said "the account was correct and should be paid as soon as he had funds sufficient to pay it" (Hord v. Lee, 4 Monore, 86;) and where

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he said "the account was just," except one item, which was then struck out (Ditto v. Ditto, 4 Dana, 504). These acknowledgments were held sufficient to repel the plea of the statute, and plaintiff recovered. But the following were held not sufficient: Defendant said "he had once owed the debt, but supposed his brother had paid it, and if he had not he owed it still" (Bell v. Rowland, Hardin, 34). So where he said "the work had been done," and either "should be" or "ought to be paid for," the witness could not say which, Held—If he said "it should be paid for," this was an express promise to pay; but if he said "it ought to be paid for," this was only an implied acknowledgment where an express or unqualified acknowledgment is necessary (Head v. Manners, 5 J. J. Marshall, 260). So where he said "the account was just so far as he knew; that he had left it to the other party and had kept no account himself, but believed plaintiff indebted to him," this was not a sufficient acknowledgment (Tillet v. Linsey, &c., 6 J. J. Marshall, 337). And where the account was presented to defendant and he objected to several articles in it, which were stricken out, and he then acknowledged that it was right, held not sufficient acknowledgment, for the account might be all right because the articles were truly noted down in it, and yet defendant might have paid it (Harrison v. Handley, 1 Bibb, 443). Compare this with Ditto v. Ditto, supra, where an acknowledgment that the account was just is held sufficient. The difference between right and just seems rather fine.

But it is to be observed that though the law will, from an express acknowledgment that the debt is still unpaid and subsisting, imply a promise to pay, as a duty, yet it will not do so if the acknowledgment is coupled with anything showing that the debtor does not mean to pay; that he means to shelter in the statute at the same time that he admits he has not paid the debt, such acknowledgment will not be sufficient. Thus where defendant admitted a balance in his hands, but declared he meant to keep it, Held—This was not an acknowledgment sufficient to repel the bar of the statute (Ficher v. Hess, 9 B.

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Monroe, 614); so where defendant expressly admitted in his answer that he had not paid the debt, but pleaded the statute, Held—Not sufficient. (Gray v. McDowell, 6 Bush, 480; Warren v. Berry, 5 Bush, 449.)

From these cases it may be seen that the statute does not simply raise a presumption of payment from the lapse of time, which may be rebutted by evidence that the debt has not in fact been paid. On the other hand, the statute aims to give repose to stale claims. Therefore, an express acknowledgment by the debtor himself that the debt has never been paid is not sufficient to answer the statute, if accompanied by anything showing that defendant claims the benefit of the statute or does not mean to pay the debt. An unqualified acknowledgment unaccompanied by anything to negative the promise which the law implies from such acknowledgment is necessary.

(2.) In each of the foregoing cases it is to be observed that the new promise or acknowledgment was made after the statute had barred an action on the original debt, but there is another class of cases where the promise or acknowledgment is made before the statutory limit has run out and during the time the debt is still in force; between these two cases there is an important difference. In the former the original debt is considered as dead and the action must be brought on the new promise, but in the latter the original debt being still in force, the action must be on it and the new promise is then given in answer to the plea of the statute, in which case it has the effect of cutting off the time that had already run, and of starting the statute anew from the date of the new promise. Thus where a note fell due in 1846, but suit was not brought till 1867, long after the statute had barred an action, but plaintiff set up an acknowledgment of the note made in 1853 (while the note was still in force), Held—This cut off the seven prior years from 1846 to 1853, and started the statute afresh from 1853, bringing the suit in 1867 within time. (English v. Wathen, 9 Bush, 387.)

A promise or acknowledgment thus made before the statute has run out need not be so express or unqualified as one made

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after the statute has run out. Thus a mere partial payment endorsed on a note by the payee (while the note is still in force) is sufficient to cut off the prior time, and the statute runs from the date of the endorsement. As where a note was due in 1849 and a partial payment endorsed on it in 1852, a suit in 1866 was in time. (Hopkins v. Stout, 6 Bush, 365; Carr v. Robinson, 8 Bush, 269; Tate v. Hawkins, 5 Ky. Law Rep., 620; Frazer v. Frazer, 13 Bush, 397.)

(3.) But in this way different periods of limitation may apply, one to the original debt and another to the new promise; where such is the case that which applies to the original debt prevails. As where the payor of a negotiable note, which is barred in five years, gives a non-negotiable note which is barred in fifteen years, the limitation is that of the original debt, five years, and not that of the new promise, fifteen years (Gilmore v. Green, 14 Bush, 772). This applies of course to the new promise only, made while the original debt is still subsisting and not to the promise made after it is barred; in the latter the action being on the new promise, would be governed by the limitation applicable to the new promise. As if, in the case just mentioned, the debtor had given the non-negotiable note after the statute had barred the action on the original negotiable note, fifteen years and not five would have been the limitation.

COURT OF APPEALS OF KENTUCKY.

SHELBY R. R. CO. v. LOU., CIN. & LEX. R. R. CO.

(Filed February 19, 1885.)

Railroads—Rights of connecting roads—A railroad establishes a station at its point of junction with a connecting road and only one-half mile from a station previously established by the connecting road. Held—It can not compel the connecting road to stop its trains at the new station and deliver and receive passengers and freight there. Nor has it the right to run its own trains over the connecting road unless expressly authorized by charter or by contract with the road.

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Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hines.

This is an action by appellant, the Shelbyville Railroad Co., against the Louisville, Cincinnati & Lexington Railroad Co., by which it is sought to enjoin the latter company from doing certain things that are claimed to be detrimental to the former. The court below dissolved the temporary injunction which had been granted, and the question is on the correctness of that ruling.

The complaint is, first, of the refusal of appellee to permit appellant the use for a half mile by its engines and cars of the road bed and turn-table of appellee; second, the refusal of appellee to make with appellant through rates and execute through bills of lading for freight and through rates for passengers and to haul its cars over appellee's road to their destination; third, the refusal of appellee to stop all its trains at the junction of the two roads, a half mile from appellee's depot.

These rights are claimed by appellant upon three grounds: First, by virtue of the provisions of the charters of the companies; second, by usage and customs between connecting lines; and, third, under contract entered into between the two companies.

Appellee's road, at the time this controversy arose, was operated under a charter granted to the Louisville and Frankfort Railroad Co. in 1847. The provisions of that charter bearing upon the questions to be considered are as follows:

"It shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons or merchandise, or produce of any description whatsoever, along said roads or any of them, without the license or permission of the president and directors of said company." (Section 44.)

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road

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hereby provided for, any other railroad, leading from the main route and diverging therefrom at an angle of twenty degrees or more, to any part or parts of the State: Provided, That in forming such connection no injury be done to the works of the company hereby incorporated." (Section 49.)

"It shall be lawful for new companies hereafter to be incorporated to unite with this road, and the said company hereby incorporated shall not charge for freight and passengers brought on from other railroads, as above permitted, any more than the regular rate charged on this road, from end to end, pro rata." (Section 54.)

In 1851 appellant, the Shelbyville Railroad, was chartered with permission to "intersect" with the Louisville and Frankfort Railroad at such point as might be agreed upon by the president and directors of the Shelbyville Railroad Co. (Section 15, Acts 1851, chapter 481.)

The Shelbyville road was constructed, nineteen miles in length, and connected with the Louisville and Frankfort road at a point a half mile from the depot of the latter road at Anchorage, at which place the L. & F. road then had and now have ample depot facilities for freight and passengers, together with switches and turn-tables. The Shelbyville road erected no depot building at the junction with the L. & F. road, had no switches or turn-tables; the only accommodation for the transfer of passengers and freight being an unenclosed platform in the angle of intersection. After this connection the Shelbyville road was permitted, without agreement, for a time to use with its engines and cars the track of the L. & F. road from the junction to Anchorage. Subsequently an agreement was made between the roads for hauling cars of each over the road of the other and for through passenger and freight rates. This agreement had ceased before the beginning of this controversy, and the track of the L., C. & L. was being used by permission only.

The common law obligations of a railroad company to a connecting line are the same, as to reception, transportation and

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delivery of freight as those existing between the railroad company and an individual shipper. Whatever rights or privileges, other than those belonging to a natural person, that are claimed by one railroad company against a connecting company must be found either in the charters of the companies or arise from contract. The legislature may unquestionably, when not forbidden by the organic law, regulate the business relations between connecting lines of railroads. In this instance we think the legislature has not attempted to regulate the business connections between the lines of the opposing companies. The language of the charters quoted not only fails to provide for more than a physical connection between the roads, but negatives the idea that there shall be any business connection except by consent or agreement. The 44th section of the act of 1847 provides that it shall not be lawful for any person or corporation to use the company's road for the transportation of merchandise or otherwise without the consent of the company.

The claim made by appellant to the use of the track of appellee, with its engines and cars, is, if granted, destructive of appellee's franchise. Appellee does a through business, connecting north, south, east and west, has eighteen freight and passenger trains passing the point of junction of the two roads within twenty-four hours, in addition to wild or extra trains that may be necessary for the transaction of the business of the principal road. From delays by accident or other emergencies it is essential to the preservation of the lives of passengers, the property of shippers and of the company, that all trains moving over the road shall be subject in their movements to the direction of the train dispatcher. Under such circumstances an independent line coming at will, with its engines and cars, upon the road of another company would necessarily so interfere with the business of the line whose road was thus used as to practically destroy it. To allow it would be to allow, without even the pretense of legislative sanction, the one company to take the property of another and

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appropriate it to its own use. In the absence of legislative or constitutional prohibition a railroad corporation has the same right, subject to common law restriction, as a natural person, to the use of its property, whether road bed, franchise, depots, rolling stock or appurtenances necessary or proper to the running of the road under its charter. If the legislature fails to make a contract between connecting lines as to the transaction of the business over and between them, a court of equity can not make a contract for them upon the assumption that it would benefit the public or the roads themselves.

The Louisville & Frankfort (now L., C. & L.) had the charter right to fix its depots at such points on the road as it might deem advisable. Prior to the building of the Shelbyville road the L. & F. R. R. Co. had established a depot at Anchorage, erected a depot building, put in switches and furnished all the facilities for passenger and freight traffic, and made that one of its regular stopping places. Subsequently the Shelbyville company, by its president and directors, without agreement or understanding with the L. & F. road, made their junction a half mile from Anchorage. As to the L. & F. Co. there was no charter or common law obligation to stop at any other than the stations established by that company. Appellant had no more right to require appellee to stop its cars at the junction of the two roads than a farmer would have to require its trains to be stopped at the point nearest his house and most convenient to him when there was no established depot at that place. This is a statement of the simple right of it, but the justice of it is stronger still. Appellant had of its own will chosen a point of connection, a half mile from the depot of appellee, which was a regular stopping place with all depot facilities, and appellant did not erect any building at the junction or in any way provide for the transfer of freight and passengers, except by the erection of an open platform. The estimated cost to appellee in stopping its trains at this junction, in addition to stopping at Anchorage where it was compelled to stop is, $25 per day. If appellant should have

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fixed its junction with appellant's road within fifty feet of the Anchorage depot, as it might have done, it would have had the same right to have required appellee to stop its trains at that junction after having stopped fifty feet beyond at the regular depot. (Atchison, Topeka and Santa Fe R. R. Co. v. Denver and New Orleans R. R. Co., 110 U. S., 607.)

It is further insisted for appellant that on the faith of a resolution passed by the board of directors of the Louisville and Frankfort road in 1852 and before the construction of appellant's road, appellant was induced to raise large sums of money to construct its road, and did construct it, on the faith that the L. & F. company would grant the privileges here claimed. That resolution is as follows: "Resolved, That the president and directors of the Louisville & Frankfort Railroad Co. will do all in their power under their charter to facilitate the transportation of freight with as little delay as possible over the Louisville & Frankfort Railroad between Louisville and Shelbyville, whenever the said Shelbyville railroad shall have constructed their road from Shelbyville to a junction with the Louisville & Frankfort road at or near Hobbs; and, further, said president and directors of the Louisville & Frankfort Railroad Co. have no doubt that such arrangements hereafter can be made between the two companies as to enable the people of Shelbyville to arrive in Louisville in the morning and return in the evening, and such other arrangements as will be mutually to the interest of both roads, and the Louisville & Frankfort Co. will make a fair contract for the connection of the two roads, should the Shelbyville Co. apply for such a connection."

I am unable to see in this any semblance of contract. At most it is simply a proposition, never accepted, never acted upon, so far as the record in this case shows. The proposition was to facilitate the transportation of freight with as little delay as possible. The complaint here is not that there was any delay in the transportation of freight, and as to passengers and freight the resolution expressly reserves that for future

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agreement. That this resolution was never acted upon by appellant and never considered binding as a contract is manifest from the agreement subsequently entered into by which the two companies regulated the terms upon which each road should carry the freight and cars of the other, which agreement afterwards expired. The most that could be claimed on the face of the resolution is that freight should not be unnecessarily delayed. That was a common law right existing independent of any agreement, and of which no complaint is made.

Judgment affirmed.

Judge Lewis dissenting.

Caldwell & Harwood for appellant.

PAGE'S EX'OR v. HOLMAN, &c.

(Filed March 5, 1885.)

Trustee—When chargeable with compound interest—Where a trustee fails to settle his accounts he is chargeable with compound interest, though he may not have been guilty of any fraud; and in a suit by the cestui que trust for a settlement, if the trustee fails to show affirmatively why the trust fund did not earn interest (he is presumed to have lent it to himself), and he is properly chargeable in the commissioner's report with compound interest in biennial rests.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

There are many circumstances shown by the testimony in this case which tend to sustain the defense that the trustees, John H. and James G. Page, had accounted to the appellee, John E. Holman, for the trust funds received by them for his use under the will of George W. Page. The long delay in bringing suit; the numerous business transactions between the parties without any assertion of this claim; the execution of promissory notes by said Holman to both John H. and James G. Page, followed by payments by and suit against him upon some of them; the payment by them as his sureties of a debt which he thereafter, in part at least, repaid to them; their sol-

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vency and nearness of residence to him, and his straitened financial condition, are among them; and occurring and existing as they did, both after the trustees received the fund and after the cestui que trust became of age, they would, in the absence of other evidence, raise a prevailing presumption that he had no just claim.

The trustees, however, never made any settlement of record; one of them testifies in the case, and does not prove that they ever made any kind of a settlement in any way or with any one, or ever accounted for the trust estate; while the appellee, John E. Holman, says that they never did. It is indeed improbable that they would have paid over to him the principal of the trust fund, as it is now claimed they did, without having a judicial construction of the will of George W. Page as to their right to do so: and it appears that another trust in favor of another party committed to them by the same will was not settled for many years.

It should be persumed that the judgment below is correct, and especially as to an issue of fact. It should not be disturbed unless it appears affirmatively from the record that it is erroneous; and not only does this appear in this instance as to the question of payment, but, in our opinion, this defense is not sustained by the testimony.

The claim to a credit of $1,200 for money alleged to have been paid to one Jewell by James G. Page as the surety of the appellee, Holman, was properly rejected.

The amount so paid is in dispute. The latter claims that Page paid but $400 of it for him, and that he paid the balance: but it matters not which sum is correct, because the testimony shows that the claim was placed by Page in the hands of an attorney for collection; that Holman claimed that Page owed him as much or more upon the settlement of a tobacco venture; that both claims were barred by limitation and both were dropped, and Holman's note surrendered to him.

Page in fact proves that the claim was settled; he says in his testimony "it was settled in some way, but I could not

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tell you how. * * * I reckon I must have received some compensation some way or somehow, but I don't recollect how it was."

The troublesome and only question in the case is now reached.

By the commissioner's report and the judgment confirming it the trustees were charged with compound interest at biennial rests.

There is no fixed rule as to what would be a reasonable period for compounding interest upon a fund in the hands of a trustee in a case where he is properly so chargeable.

The particular circumstances of each case must be regarded. If he gets yearly the use or interest, then it is morally just that interest should be counted thereon after he receives it.

By the civil law a trustee who used or perverted the trust fund was chargeable with extraordinary interest.

In England different rates of interest are charged according to the circumstances of each case; but there, as is the case at common law, a private trustee acts gratuitously in the absence of a stipulation for pay, save a per diem by way of indemnity for expenses may be allowed him; and he is only liable for such gross neglect as evinces bad faith or willful misconduct.

Here, as different rates of interest can not be applied to different degrees of negligence, the only question is whether simple or compound interest should be charged in a case where the trustee ought to have made the funds profitable.

The authorities are somewhat conflicting as to it.

It is said in Perry on Trusts, volume 1, section 471, that "if he (the trustee) has so mingled the money and the profits with his own money and profits that he can not separate and account for the profits that belong to the cestui que trust, the cestui que trust may have legal interest computed with annual rests, in order to compound it. * * * The burden is on the trustee to show that he made no profits, or received no benefit from the money; and if he refuses to account or to show the amount

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of profits received the court will give compound interest, in order that it may be certain that the cestui que trust gets the profits of the trade or business in which the trustee has employed the money."

This court has, however, held, as it may be regarded as the rule in this State, that a trustee may be charged compound interest even in the absence of fraud or intended misconduct.

In Clark and Wife v. Anderson, 10 Bush, 99, the trustee had acted in good faith, but in such a way that he had to be treated as a trustee holding the trust fund for his own benefit, and interest was compounded biennially against him.

In Maupin's Ex'or v. Dulaney's Devisees, 5 Dana, 590, it was compounded only every three years, because during a part of the time the relief system prevailed; while in Greening v. Fox, &c., 12 B. Mon., 187, it was allowed every two years. In Clemens v. Caldwell, 7 B. Mon., 171, where a trustee failed to invest the fund as directed, and used it in his own business, interest was compounded each year.

In this case it is alleged in the petition that the trustees used the trust money in their own business; and while a denial of this is interposed, yet no showing is made as to what they did with it; the burden properly rested upon them to disclose it; and they content themselves with a plea of payment which can not be sustained. It is clear that they received the money; that it was their duty to make it profitable; as already observed, they never made any settlement, and they do not show that they kept the trust fund separate from their own means; and having never accounted for the trust estate, they should be treated as having loaned it to themselves; and under such circumstances the interest should be compounded against them. It is not only equitable that this should be the rule in such a state of case, but it will tend to prevent abuse and to indemnify against negligence.

Chancellor Kent held in Scheiffelin v. Stewart, 1 John. Chan., 620, after a learned review of the authorities, that under such circumstances a trustee should be charged annually with

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compound interest; while in this case it has been done only biennially.

Judgment affirmed.

Judge Lewis not sitting.

Porter & McQuown for appellants.

W. P. D. Bush and Finlay F. Bush for appellees.

POWER, &c. v. DOUGHERTY.

(Filed March 10, 1885.)

Mode of descent of land—Infant dying without issue—Where an infant dies without issue and entitled to real estate descended from his mother, and leaving as his nearest kindred uncles and aunts on the maternal side and a grandfather on the paternal side, the land passes to the uncles and aunts and not to the grandfather.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Pryor.

The will of Ambrose Jones, of Bath county, devised his land to his widow for life and the remainder to be equally divided between his four surviving children and the children of a deceased daughter. One of the grandchildren married Butcher and died, leaving an infant child. The child died and the question arises, who is entitled to the land? The infant had neither brother nor sister, but uncles and aunts on the mother's side and a grandfather on the father's side. The court below held that the land passed to the grandfather. This was error. The statute provides: "If an infant dies without issue having title to real estate derived by gift, devise or descent from one of his parents, the whole should descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred, but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants."

By this express provision of the statute the intestate dying under age and deriving title to the land from the mother, it

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passes to the kindred on the mother's side, "where that kindred is not more remote than the grandfather or the grandmother, uncles and aunts of the intestate and their descendants." The infant had no grandfather or grandmother on the mother's side, but had uncles and aunts. The paternal grandfather was living, and from the judgment below was given the estate.

This was reversing the line of descent and giving to the paternal line the entire estate, when the infant became entitled to the estate from the mother. The maternal kindred inherit and not the kindred of the father.

The judgment, therefore, is reversed for proceedings consistent with this opinion.

R. Gudgell & Son for appellants.

V. B. Young for appellee.

ANDERSON'S ADM'R v. MEREDITH.

(Filed March 10, 1885.)

Fraudulent conveyances—Adjusting equities between wrongdoers—Where grantee obtains a conveyance without any consideration, and by the exercise of undue influence over the weaker mind of the grantor, a court of equity will, notwithstanding the grantor also has been guilty of fraud in making the deed to defraud his creditors, decree a rescission and reconveyance of the land to the grantor; and will fully adjust the equities between the two wrongdoers by allowing the grantee his expenses in managing the estate while in his hands.

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Hines.

In 1873 and 1874 Wm. Anderson, being the owner of several parcels of land in the counties of Grayson, Edmonson, some personal property and evidences of debt, he conveyed to appellee, Meredith, four of the tracts of the land for the recited consideration of $1,100 and assigned to him evidences of debt amounting to several thousand dollars. At the same time he conveyed to Vanmeter two tracts of land and delivered to him personal property of considerable value. Immediately after these transfers Anderson went to Missouri and remained until 1877 when he returned. Shortly after Anderson's return from

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Missouri he instituted this action against appellee, seeking to recover the land conveyed and the value of the evidences of debt transferred by him to appellee, alleging that the sale and transfer of the land and the evidences of debt were without consideration and upon the agreement that appellee would retransfer the land and reassign such of the evidences of debt as had not been collected and paid to Anderson when Anderson should return to Kentucky. Shortly after the institution of the action Anderson died, the action was revived in the name of Vanmeter as the administrator of Anderson, and the divorced wife and the infant son of Anderson were made parties. The infant answered through guardian ad litem, making the answer a cross petition against appellee, alleging that the conveyances and transfers by Anderson to appellee were without consideration and obtained by fraud through the undue influence exercised by appellee over Anderson, and at a time when Anderson from age, feeble health and natural defect of mind was not competent to transact any business. The divorced wife and mother also filed an answer and cross petition, alleging substantially what had been alleged for the son and in addition claiming that at the time of the pretended sale in 1874 by Anderson there was a suit pending by her against Anderson for divorce, in which action maintenance had been allowed her and had not been paid, and that this transfer and sale was made by Anderson to appellee to defraud her out of maintenance and alimony; and that with a full knowledge of these rights and claims of hers, and of the fraudulent design of Anderson, appellee made the pretended purchase with the design to aid the fraud of Anderson. All these allegations as to want of consideration and fraud were denied by appellee, and as to the claim of Mrs. Anderson appellee pleaded estoppel and former adjudication, alleging that pending the suit for alimony, but after the divorce had been granted, Mrs. Anderson had caused appellee and Vanmeter to be made parties to that suit, and therein sought to subject the property conveyed and transferred to them by Anderson upon the ground that the

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transfer was without consideration, and made and accepted for the fraudulent purpose of defeating her claim for maintenance an alimony; alleging further that, pending this proceeding by Mrs. Anderson to subject the property, appellee compromised with her and paid her $1,000 in consideration of her release of all claim against the property for maintenance, alimony or dower, and that this agreement of compromise was entered in the judgment of the court as the ground for dismissal of her action against appellee. The court below adjudged that the deeds be cancelled; that appellee account for the evidences of debt transferred to him; that he be allowed a reasonable compensation for managing the property, attorneys' fees expended in collections and in the preservation of the estate against the claim of Mrs. Anderson, and on report of a special commissioner adjudged that appellee recover of appellants the sum of $474.15, and that appellee have a lien upon the land for the payment of that sum. From this judgment both appellants and appellee appeal—appellant upon the ground that the court erred in failing to charge appellee with as much for property received by him from Anderson, in failing to charge for rents and in allowing appellee attorneys' fees and compensation for managing the property; and appellee appeals from so much of the judgment as rescinds the contract.

The first inquiry is, was this transfer and alleged sale by Anderson to appellee fraudulent as to one or both? It appears to us from a careful reading of the entire voluminous record that there can be no doubt that the alleged contract was intended by both the parties to it to defraud and defeat the claim of Mrs. Anderson. The letters written by appellee to Anderson after he went to Missouri and the letter of Anderson to appellee are in themselves, to our minds, conclusive. The explanation attempted to be made of them by appellee in no way qualifies their meaning appearing on their face. The letter from Anderson to appellee asks for money; says times are hard and work hard to get; inquires how appellee is getting on with

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his (Anderson's) business; asks what is being done with the mill property (being a portion of the property conveyed to appellee), and urges appellee to hurry up collections and send him what appellee has "of mine on hands." The first letter from appellee to Anderson informs him that there is bad news; "the mill got burned down last March;" says "we are aiming to rebuild the mill if you say so. Write to me on the subject;" times are very hard, money is very scarce. "I am getting along very slow with your business. I am doing the best I can. I am getting the business in very good shape." In the same letter he enclosed an order on Vanmeter and requested Anderson to sign it and return so that he (appellant) may collect from Vanmeter what he has belonging to Anderson, and express the fear that Anderson will lose it if he does not allow him to collect it, giving as a reason that Vanmeter is getting involved financially. In the same letter appellee says: "I have put some notes out and some pleads limitation, and I am removing some. * * * I think I will sell the land in a short time at a very good price."

The next letter from appellee to Anderson mentions having before written to notify Anderson of the suit above mentioned as having been brought to subject the property to the claim of Mrs. Anderson, and informs Anderson that he has compromised the claim by assigning to Mrs. Anderson one of the notes transferred by Anderson to appellee, and complains of having been compelled to pay large attorneys' fees in the case; says he has paid out more money than he has collected; that he has contracted to sell all the lands; says he would like Anderson to come back, but didn't think it advisable, as Lawless (attorney for and father to Mrs. Anderson) "would put you in prison." He again urges Anderson to authorize appellee to collect from Vanmeter as he (Vanmeter) had sold all the stock and contracted to sell the land.

The next letter refers again to the settlement with Mrs. Anderson; tells how it was settled, and says "we are out of it clear now, but it cost us a good deal of money, but all the prop-

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erty is safe now;" tells Anderson that Lawless has another suit against him, and would send for him if he knew where he (Anderson) was. He says: "I have brought suit on the most of the notes, but have collected but little. As soon as I collect I will send to you according to promise;" mentions again that he has contracted the land and that the mill is doing "tolerably" well. Says: "I hope to see you again, but you had better not come for a while."

The order referred to in these letters was never returned by Anderson, and on the return of Anderson to Kentucky Vanmeter appears to have accounted for the property he received from Anderson.

There is no explanation given as to the meaning and object of this correspondence that renders it consistent with the claim that the pretended sale from Anderson to appellee was for a consideration and in good faith. The evidence tends to show that Anderson had no money while in Missouri and that he had none when he returned. There is no evidence of any payment by appellee to Anderson except the repeated statements made by Anderson to the effect that he had received the money for the land, and the testimony of two witnesses that Anderson had money, a large sum, immediatley after the date of the pretended sale. Several witnesses testify to statements by appellee to the effect that the sale and transfer was without consideration. In some cases these statements are contradicted by the witnesses for appellee, but we consider it unnecessary to notice the evidence upon the point of fraud and no consideration as we think the evidence already referred to puts the question of fraud beyond doubt.

That conclusion being reached the inquiry is, does the record exhibit a state of facts that will give a court of equity the right to entertain appellant's complaint?

The general rule is, in cases of executed contracts, where both parties are guilty of actual fraud, a court of equity will not lend its aid but leave each to the consequences of his own wrongdoing. To apply this rule the parties must be in pari

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delicto, each equally guilty of the fraudulent intention and the fraudulent acting, with equal knowledge and equal willingness. When that is not the case, where there is imposition, duress, oppression, threats, undue influence, taking advantage of necessities or weakness, the party thus placed at disadvantage, although participating in the fraud, may be relieved in a court of equity as against his co-wrongdoer. The exception to the general rule applies in all cases where the mind of one of the actors in the fraud exercises an undue dominion over that of the other, whether it results from the intellectual or physical weakness of the one overreached or from a too confiding and trusting nature. (Pomeroy on Equity, volume 2, sections 941, 942.)

The evidence in this case shows that the mind of Anderson was weak, and that he was so trusting and confiding in those with whom he was brought in contact and so subject to the influence of stronger wills as to indicate that his mind bordered on imbecility. He is shown to have been very forgetful, to have shrunk from assuming responsibility, and to have questioned his capacity to cope with those with whom he was brought in contact in the transaction of business. Upon the other hand, appellee is shown to be a man of shrewdness, self-reliance, that he is a money-getting, money-loving and a man of fine business capacity and experience. There is reason to believe from the record that appellee exercised this superior capacity and will over Anderson to induce him to make the trade, to leave Kentucky and to remain away with the view of ultimately securing to himself the whole property without paying anything therefor. Much of the evidence in this voluminous record leading to this conclusion is circumstantial and of such a character as not to render it practicable to discuss it in detail in the limits of an opinion, but the whole atmosphere surrounding the transaction produces a moral conviction that the conclusion stated is correct.

It is insisted that the court erred in giving appellee judgment for anything because it was not claimed in the pleadings, ap-

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pellee insisting throughout the progress of the case that he did not hold as trustee, but as a purchaser for valuable consideration. It is particularly insisted that there should be no allowance to appellee for services in taking care of and managing the property, because of his established fraudulent conduct in the transaction. As to these matters the original petition filed by Anderson recognized appellee's right to compensation for services and expenditures, but this is immaterial as the court having taken jurisdiction, as we have held properly, it was its duty to adjust all these matters in an equitable manner so far as could be done between wrongdoers. It is not a case where appellee was wholly in the wrong and can not be so treated, but must be treated in these matters which are incidental to the exercise of jurisdiction in decreeing a rescission as if the parties were neither guilty of fraud.

We will not inquire into the correctness of the rulings of the court in allowing or disallowing items in the commissioner's report, because the assignment of error in reference to them is too general to present anything for our consideration. Notwithstanding this conclusion, it is proper to say that we have carefully read all the evidence in the case and that on the whole case we see no error in the rulings of the court in this or in any other respect.

Judgment affirmed both on appeal and cross appeal.

B. Lawless, Sr., and Conklin & McBeath for appellant.

W. E. Settle and E. W. Hines for appellee.

JONES v. GIBSON, &c.

(Filed March 5, 1885.)

Taxation—Delinquent taxpayers—Right of surety on sheriff's bond—A surety on a sheriff's bond who pays to the State taxes due by delinquent taxpayers is not subrogated to the rights of the State against such delinquents. The collection of taxes does not properly belong to the courts.

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Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

This is an action in equity by a surety in a revenue bond to subject the amount of taxes due and unpaid by delinquent taxpayers to the satisfaction of his demand against the defaulting sheriff.

It is alleged in the petition that B. F. Gibson was the legally qualified and acting sheriff of the county of Henderson during the years 1876, 1877 and 1878, and as such, in January of each of those years, executed the bond required by law for the collection of the State revenue, with appellant and others his sureties; that he paid the full amount of the revenue due for year 1876, but failed to pay into the State treasury, as he covenanted to do, the full amount due for the years 1877 and 1878, and in consequence of his defalcation the balance due was coerced from his sureties, appellant paying thereof for the year 1877 $196, for the year 1878 $2,500, and the further sum of $183, no part of which has been repaid to him by Gibson, who is now a nonresident of the State.

It is further alleged that each of the appellees were owners of property subject to taxation in that county for the years named, and the several amounts of taxes set forth in the petition were duly assessed against them, and that although payment thereof was, in the manner required by law, demanded of each of them by Gibson as sheriff and collector, they failed to pay the sums mentioned, which he says are yet owing by them respectively to him.

Appellant, therefore, prays in his petition to be subrogated to the alleged lien of the Commonwealth, and that judgment be rendered against them respectively for the amount thus due to Gibson, to be applied when collected to the satisfaction of appellant's demand against him.

The question presented on this appeal is whether, on the facts stated, appellant has a cause of action.

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The sheriff and his sureties having accounted for and paid the whole revenue tax due for the years named, the Commonwealth has no longer any claim therefor against them or the taxpayers. And if taxes could be properly regarded as debts founded on contract, express or implied, and enforcible by judicial proceedings, appellant might, in the case presented, subject the several amounts assessed against the delinquent taxpayers to the satisfaction of his demand against the sheriff. But taxes have never been held by elementary law writers or courts as debts in the ordinary meaning of the word, nor have they been so treated by the legislative or judiciary departments in this State.

To prescribe the mode of collecting as well as to raise revenue belongs exclusively to the legislature, and the necessities of the government and welfare of the taxpayer require the mode should be summary, and at the same time as little annoying and expensive to him as possible. And as it has heretofore been the uniform policy and practice in this State to commit the collection of taxes for the support of the government to other agencies, we do not think it should be presumed that the legislature intended in any case, where it is not clearly expressed, that the judiciary department should interpose and subject the taxpayer to tedious and expensive litigation.

By reference to the statute it will be perceived that the officers who are to collect the taxes and the mode of collecting are particularly and specifically provided, and summary and effective means exist for the efficient collection and indemnity of the officer appointed to collect the taxes. He is authorized to distrain the goods and chattels owned by or in the rightful possession of the person from whom tax is due, or if there be no personal property which he can distrain for taxes he may, in the manner prescribed, levy on and sell real estate for the purpose, or may garnish any person indebted to the taxpayer. Moreover he has by law the same power for five years after the expiration of his term of office to collect any arrearages of revenue which fell due during his official term, and for which

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they are and were responsible, as he had before the expiration of his term of office.

It may be that by reason of the default of the sheriff and his nonresidence appellant is now without remedy. But the statute gave to the sheriff ample means in the first instance to collect the taxes due, and five years after the expiration of his term in which to collect the arrearages of taxes. And the misfortune of appellant is to be attributed to the sheriff for whom he became a surety, rather than to a defect of the law.

But, however that may be, no express power is conferred by law upon the judiciary to afford the relief asked, and we do not think, in view of the settled policy of this State in regard to the mode of collecting taxes and the cost and vexation that would result to taxpayers from litigation in the courts, that we have a right to imply the power to interfere. It is with the legislature alone to afford remedies in such cases.

Judgment affirmed.

Thomas E. & E. C. Ward and W. B. Pentecost for appellant.

EMPIRE COAL AND MINING CO. v. McINTOSH.

(Filed February 14, 1885.)

1. Verdicts—Special and general—Where either party asks a special verdict the court must order it, but it may in its discretion direct a general or a separate general verdict also. Section 327, Civil Code, is a limitation upon the power of the jury and not upon the discretion of the judge.

2. Setting aside special verdict—A special verdict, like a general verdict, can not be set aside unless flagrantly contrary to the evidence.

3. Instructions—Where the special findings are sufficient to sustain the verdict it is immaterial whether the instructions upon the general law of the case were or were not correct.

Appeal from Christian Circuit Court.

Opinion of the court by Chief Justice Hines.

John McIntosh while in the employ of appellee as a common laborer engaged in mining coal was killed by the falling of a portion of the roof of the mine. This action was brought by the widow of McIntosh under section 3 of chapter 57 of Gen-

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eral Statutes, which authorizes an action by the widow, heir or personal representative where the killing is the result of willful negligence, and permits the recovery of punitive damages. The petition alleges willful negligence, and that it consisted in the failure of appellants to prop the roof of the mine entry where the deceased was required to work. The answer denies this negligence and alleges contributory negligence on the part of the deceased, in that he was not at the proper place for his work at the time of the killing, and that he failed to prop the entry to his own mining room as it is charged it was his duty to do; and further, that the deceased, in violation of the orders of the superintendent of the mine, willfully and negligently removed a portion of a column of coal that was left for the support and did support the roof, and that by reason of such removal the killing occurred.

Upon these issues the case went to trial and a verdict for $3,000 was returned, and from the judgment thereon this appeal is taken.

On the conclusion of the evidence appellant asked for and obtained directions to the jury for special findings on questions propounded by appellant. The court also, at the instance of appellee, directed a separate general verdict, and of its own motion directed the jury to ascertain the damages under the special findings and also instructed them upon the whole law of the case, and directed them to return a general verdict.

The first complaint is that it was error in the court to direct any other than a special verdict when appellant had requested that none other be directed. This objection is apparently based upon subsection 2 of section 327 of the Code, which provides that on the finding of a special verdict "the jury shall return a special verdict only, and the court shall render judgment upon it."

The court did not err in this. The subsection quoted is intended as a limitation upon the power of the jury to return any character of verdict when not otherwise directed by the court. It was not intended to restrict the court as to the character of verdict it might direct. The 317th section provides that

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in case of special verdicts the court may reserve the questions of law unitl the special findings are had. It is not compelled to do so. When the court directs special findings it should be in reference to every fact essential to make out a cause of action or defense, so that on the return of the answers there is nothing for the court but to apply the law to the established facts and enter judgment accordingly. In such case there is no necessity for a general verdict for the special, when of the character indicated, controls the general verdict, but such a general verdict may be directed at the pleasure of the court and as well a separate general verdict. When all the essential facts are found under special direction the question of negligence and its degrees is a question of law for the court alone. (Witty v. C. & O. & S. W. R. R. Co., 6 Ky. Law Rep., 321 (82 Ky.), and Adams' Adm'r v. R. R., MS. Op., March 12, 1885.

The special findings of facts asked for by appellant with the answers thereto are as follows:

1st. Did the roof or ceiling of defendant's mine, at the place where John McIntosh was killed, fall for the want of props under said ceiling?

Yes.

2d. If there were props under said roof or ceiling at the point mentioned in question No. 1, before said John McIntosh was killed, were said props knocked down or displaced? If so, when and by whom was it done?

No props.

3d. On the day and at the time of said accident, did said John McIntosh know that said roof or ceiling at said place was unpropped?

We can not tell.

4th. Before and at the time of said accident, did the defendant, or its business manager or pit-boss, know that the ceiling or roof of defendant's mine, at the place where said accident occurred, was unpropped and in a dangerous condition?

Yes.

5th. If said roof or ceiling at said point was in an unpropped and dangerous condition, could the defendant, by the exercise

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of ordinary vigilance on the part of its business manager or pit-boss, have known the same in time to have prevented said accident?

Yes.

6th. At the time when said accident occurred was said John McIntosh engaged in the work he had been employed by the defendant to do, and was he at the place or point in said mine where he was required by said employment to be?

Yes.

7th. Could John McIntosh, by the exercise of ordinary care for his own safety, have avoided the accident which resulted in his death?

No.

The court of its own motion then instructed the jury:

"That if they should find under the separate issue of negligence as submitted that John McIntosh was killed by reason of the negligence of defendants in failing to properly care for and protect the roof of their mines, then they should find a general verdict for the plaintiff, fixing her damages." Under this instruction the jury returned the damages at $3,000. On the measure of damages the court directed that they might find punitive damages as authorized by the statute.

The responses of the jury to the special inquiries rendered any other instructions unnecessary except those as to damages and the measure thereof, which were given. The jury found the existence of all the facts essential to the determination of the issues of negligence and contributory negligence. They found that the roof fell for the want of props; that there had been no props under that portion of the ceiling; that appellant knew before and at the time of the accident that the roof was unpropped and in a dangerous condition; that McIntosh at the time of the killing was engaged in the work he had been employed by appellant to do and was at the place where his employment required him to be; and that he could not by the exercise of ordinary care for his own safety have avoided the accident. These facts, on the issues as made, constituted will-

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ful negligence on the part of appellant, and as what constitutes willful neglect is a matter of law for the court, and the amount of damages having been assessed, there was nothing for the court to do but to render judgment for appellee for the assessed damages. Counsel discussed at great length the evidence bearing upon the second special findings, insisting that the evidence does not authorize them. It is sufficient to say that we must treat the evidence as to special findings as we do that upon a general verdict and that we will not disturb the one or the other unless the conclusion of the jury is flagrantly against the evidence. In this case there is some conflict in the evidence upon several questions submitted, but the findings by the jury are by no means without support from the evidence. It is needless, therefore, to discuss the evidence in detail. Negligence being a question of law for the court, under the special findings it is immaterial what instructions the court gave as to the degree of negligence that would authorize a recovery, and equally unnecessary to inquire into the correctness of the instructions given upon the whole law of the case under the direction for a general finding.

There is a motion in the case made by counsel for appellee to dismiss the appeal upon the ground that appellant's right to prosecute the appeal had ceased because appellant had compromised with appellee, without the consent of her counsel, after judgment and supersedeas, by which appellee released all claim against appellant when appellant knew that one-half of the judgment obtained belonged to appellee's counsel. This motion must be denied, because there is no plea by verified answer to raise the issue as required by section 758 of the Code, and because the facts as exhibited do not show a satisfied judgment.

Judgment affirmed.

Joseph I. Landes and Petree & Littell for appellants.

John W. McPherson and Campbell & Gaither for appellee.

April, 1885—3

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BURCH v. ATCHISON, &c.

(Filed February 19, 1885.)

1. Homestead—Abandonment—Rights of creditors—Where one removes from land in which he has a homestead and resides elsewhere for five years, and during his absence his creditors levy on his interest, after which he returns and claims his homestead, Held—The courts will incline to favor the creditors and to presume a permanent abandonment of the homestead.

2. Widow—Homestead out of dower interest—A widow having only a dower interest in land is entitled, before her creditors can subject it to her debts, to be allowed homestead out of the dower interest, just as if she had the fee.

3. Waiver of homestead—Where a widow applies for dower and does not ask homestead, her right to the latter is waived.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Hines.

The husband of appellant died leaving her, with several children, in possession of a small farm which the family had for years occupied as a home. Appellant applied for and was allotted dower, embracing the residence. No homestead was asked for or assigned. She remained with one or more of the children upon the place for some two years when she rented it by the year and removed to the city of Bowling Green, some six miles from the farm, there rented property and kept house with some of her children for more than five years when she removed to and took possession of the farm. At the time of the move to Bowling Green the youngest child was of age. While living in Bowling Green she contracted debts on which judgments were obtained, executions issued, the farm sold and purchased by appellee. After the sale under execution and with knowledge thereof appellant repossessed herself of the farm. She brought this suit to set aside the execution sale upon the ground that she was entitled to a homestead, the dower interest sold being of less value than $1,000. She appeals from a judgment holding the sale valid.

By proceeding to have dower assigned and not insisting upon the allotment of homestead appellant waived any homestead right she may have had, and thereafter held a life estate in the property assigned to her as dower. In this she was entitled to

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a homestead, not in the right of her husband's occupancy and ownership which she could not have abandoned to the detriment of any infant child, but in her own right as by purchase. The homestead right she held in the dower interest she might abandon as if a fee, so that the whole of it could be subjected to her debts. But it is immaterial whether she held the place as a homestead derived through the husband or by virtue of her dower interest, since all the children were of age at the time appellant removed to Bowling Green. The only question is whether there was an abandonment of and a waiver of the homestead right by reason of the removal to and residence in Bowling Green.

As to the intention to abandon the homestead the facts are, in addition to those stated: Appellant testifies that she removed to Bowling Green because she could not remain on the farm with her daughter, her sons residing in Bowling Green and elsewhere; that she intended to return as soon as she could induce one of the sons to take charge of the place; that she left on the home premises, and in a room reserved, certain personal property that she did not need in keeping house in the city, and during the time she was away she sent other personal property. Two of the sons testify that after the removal to Bowling Green the question of going back to the farm was discussed and that appellant manifested a desire to go if one of the sons would go with her. Upon the other hand are these facts: Appellant was over sixty years of age; her children passed minority; her sons residing in Bowling Green; more than five years residence by her elsewhere; no domestic ties or obligations to take her back, and the testimony of one witness that she said she had rather live in Bowling Green, and that when she went there she would go to stay. The circumstances under which appellant returned to the claimed homestead does not strengthen the claim that she had originally intended to return. She waited more than five years, and then did not return until the property had been sold under execution for debts she had contracted after abandonment. It is impossible to

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lay down an absolute rule as to the amount or character of evidence that will be sufficient to establish the fact of waiver or abandonment of a homestead right. Every case must be determined by the facts established in evidence in the particular case. In cases, however, where rights intervene after the actual occupancy of the claimed homestead has ceased, the court should incline the more strongly to the conclusion that there was a present intention on leaving to remain permanently away. The act of leaving, as in this case, was notorious, and the credit may well have been extended upon the faith of the property formerly occupied as a homestead, whereas the same presumption could not arise where the debts were created when the debtor was in actual or personal occupancy.

We do not think there was error in allowing appellee to file an amended answer. The amendment only set up and relied upon the proceeding by appellant in the county court by which she sought to have dower allotted to her. The existence of these facts were substantially alleged in the petition. In any event it was a matter of discretion with the court below, which does not appear to have been abused and which does not appear to have prejudiced appellant.

Judgment affirmed.

John M. Galloway for appellant.

Mitchell & DuBose for appellees.

The following opinion decides an important question, and as it has never been reported, its publication in the Reporter may be valuable to the profession:

IN THE MATTER OF THOMAS C. JONES.

(Filed September 8, 1874.)

1. The clerk of Court of Appeals does not receive his commission from the governor.

2. Where one claiming to have been elected clerk of Court of Appeals presents the certificate of board of examiners to his election, and offers to give bond and take the proper oath, the court must permit him to do so, and can

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not refuse upon the ground that a question as to his eligibility is pending before the board of contested elections.

Opinion by Chief Justice Peters.

In the matter of Thomas C. Jones, who, claiming to have been elected clerk of the Court of Appeals of Kentucky, moved the court to be permitted to execute the official bond, take the oaths prescribed by law and enter upon the discharge of the duties of his office.

He produced to the court the certificate of James Stewart, a circuit judge of the Commonwealth of Kentucky, bearing date 25th of August, 1866, that he was qualified to discharge the duties of clerk of the superior and inferior courts of this Commonwealth.

He also produced to the court the certificate of the board of examiners of the returns of the election for August, 1874, from which it appears that a majority of the votes cast at the election held on the first Monday in August, 1874, for clerk of the Court of Appeals was cast for said Jones, and it was shown to the satisfaction of the court that the persons offered as his sureties in his official bond were good and altogether sufficient.

But Mr. John B. Cochran objected in court to Jones' qualifying and entering on the discharge of the duties of the office aforesaid.

Because, as he alleges, at the time of the election, said Jones was not eligible to said office for reasons specifically set forth in a writing filed.

And claims that as he received the next highest number of votes cast at said election for clerk of the Court of Appeals he is entitled to the office.

He furthermore says in said writing that he has given notice to Jones that he will, before the proper board, contest his right to said office, and ask the court to refuse the motion of Jones to qualify until the contesting board shall have determined who is entitled to the office.

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There is an apparent inconsistency or discrepancy in section 1, article 11, chapter 33, and section 15, chapter 81 of the General Statutes. The first section named provides that the governor shall commission all officers elective by the voters of the whole State, other than the governor and lieutenant governor or of any judicial district, and also the chancellor of the Louisville Chancery Court. While section 15 of chapter 81 enumerates specifically what officers shall be commissioned by the governor, and in that enumeration the clerk of the Court of Appeals is not included, the comprehensive language of the first section quoted must be held to be restricted by the last section to the officers therein specifically named. Indeed it may be considered that the last-named section was enacted for that special purpose, as there is no other perceptible object therefor.

We, therefore, conclude that upon the presentation of the certificate of the board of examiners, showing that a majority of the votes cast for clerk of the Court of Appeals at the August election, 1874, were cast for Jones, and his offer to execute his official bond with good and sufficient sureties and to take the oaths prescribed by law, this court has no legal authority to refuse to permit him to do so and to enter on the discharge of the duties of his office.

But this proceeding will not interfere with the right of the contesting board to proceed in the performance of the duty devolved on it by law.

LIKEFIELD, &c. v. LIKEFIELD.

(Filed February 28, 1885.)

Conditional will—A testator made his will in which he provided that "if any accident happen to me that I die from home my wife shall have everything." He died at home many years afterwards, having preserved the will and read it within a year of his death. Held—That his dying away from home was not a condition precedent to the will taking effect, and that the wife was entitled to the estate under it.

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Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Holt.

A paper wholly written by William A. Likefield, and worded as follows, is in question as his last will by this appeal, after having been probated as such by the Jefferson County Court and its judgment sustained by the Jefferson Court of Common Pleas:

"Louisville, January 14, 1859.

"If any accident should happen to me that I die from home my wife, Julia Ann Likefield, shall have everything I possess, the house and lots and the money that is due to me, and for her to hold it as her own. WM. A. LIKEFIELD."

He died at home on March 28, 1881, leaving the appellee as his widow, but no children, they having previously died. The testimony shows that the decedent, about the date of the above writing, occasionally made steamboat trips upon the Ohio river as a watchman; that he and the appellee lived happily together as husband and wife for over thirty years; that he kept the paper in contest in a small tin box; that in the latter part of the year before his death, and in the presence of his wife, he examined his papers, including it; and after reading it over replaced it in the box and directed her to take care of it.

His brother and sisters and the children of a deceased brother now contend that it was a contingent will, and never became effective as he died at home; that the words "if any accident should happen to me that I die from home" constitute a condition; while, upon the other hand, the widow urges that they were only used to give a reason for making the will.

A few general observations may aid in the solution of the question. The rule is that courts will not incline to regard a will as conditional if it can be reasonably held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be temporary or contingent it will be upheld. In this instance if the testator, by the words he used, referred to the

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possibility of his accidentally dying from home as a reason for making the will, then it must be maintained; but if he intended by them to show that he was then making only a temporary or conditional disposition of his property it must fail, because the event named never happened.

An unexpressed intention, however strongly we may suppose it to have existed, can not be enforced; but, upon the other hand, a will can not be allowed to fail upon slight indications that the testator intended it to be conditional. The end, however, to be assiduously sought is the intention of the testator, and all rules must be subordinated to it.

A brief review of adjudged cases may also serve to bring us to a proper conclusion, although each case involving the construction of an instrument must necessarily depend upon the particular language used, and we have been unable to find any exactly similar case.

In Parsons v. Lanoe, 1 Vesey, Sr., 190, the words "if I die before my return from my journey to Ireland," etc., were held to constitute a contingent will, and an inoperative one, because the maker returned home.

"In case I die before I join my beloved wife," etc., shared a like fate. (Sinclair v. Hone, 6 Vesey, Jr.)

In Todd's will, 2 Watts & Sergeant, 145, the testator had in view a certain journey, and the language used was: "My wish, desire and intention now is that if I should not return," etc.; and the will was held to be conditional. Also in Massie v. Griffin, 2 Met. (Ky.), 364, where the will was made while the testator was on a visit in Missouri, and he willed the notes and accounts he held on his brothers to them in case he never returned. Also "In the Goods of Robinson," L. R., 2 P. & D., 171, where the words were: "In case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London, that I give and bequeath," etc.

In Maxwell v. Maxwell, 8 Met. (Ky.), 101, the words were: "If I never get back home I leave you everything I have in the world." In this case the testator was away from home

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when the will was made; he had just escaped from a steamboat disaster; the navigation was peculiarly dangerous at the time and the necessary continuation of his journey homeward continued the danger; and it was plain from the entire instrument (a letter) that it was intended to be operative only during his absence upon that occasion.

In Dougherty v. Dougherty, 4 Met. (Ky.), 25, the language was: "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive my wish is," etc.

It will be noticed in all the above cases and in others not now at hand, where the will has been held to be conditional, that a specific contingency is named, and it either confined to a time certain or a particular event.

In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. No specific time or particular event is named. It refers to no particular expected calamity, and the words are general in their character; and this fact leads to the conclusion that the testator, who was evidently not an educated man or an adept in writing such instruments, did not intend the disposition of his estate to depend upon whether he died at or away from his home.

It would have been an absurd condition; and while it is true that he had a right, if he chose to impose it, yet whether it is reasonable in its character can properly be considered when it is a question whether the words were used as a mere reason for executing the paper or as a condition upon which it was to become operative.

It is quite natural for a person to give some reason for making a will; and as has been well said, a "close and literal interpretation may very easily carry us wide of the intention."

Swinburne says: "Albeit the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator."

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Where the words "lest I should die before the next sun, I make," etc., were used in a will written eighteen years before the testator's death, it was upheld. (Burton v. Collingwood, 4 Hagg., 176.)

So "in case I should die on my travels," etc., although the testator returned home, it being shown that he recognized the paper as his will shortly before his death. (Strauss v. Schmidt, 3 Phill., 209.)

In re Tylden, 18 Jurist, 186, the language of the will was: "If it please Almighty God to call me suddenly from this mortal life, and during my absence from home, I leave," etc.; and it was sustained, although the testator died at home.

So in re Dobson, 1 Eng. Law Reports, 88, where the words were: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," etc. Also in Thomes case, 4 Sw. & Tr., the language being, "I request that in the event of my death whilst serving in this horrid climate, or any accident happening to me, I bequeath," etc.

In the case of Bradford's Adm'x v. Bradford, &c., 81 Ky., —, the language of the will was of a more conditional character than in this instance, to wit: "Being in the full possession of all my mental faculties, but in feeble health, and about to start upon a long journey, and subject to the common casualites of others, I deem it prudent to provide for the disposition of my property in case I should not return;" and it was held that it was not contingent, and although the testator returned home and lived for several years thereafter, yet it was sustained.

It is shown in this case that the testator carefully preserved the paper in contest; that he examined it the year prior to his death; and while these facts can not constitute a statutory republication of it, yet they illustrate the intention of the maker of the instrument as they tend to show that he believed he had disposed of his property by it; and while the word "if" is an apt one to express a condition, yet the language used is so general in its character that it shows the testator intended it as words of inducement to the making of the will only, and not

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that the disposition of his property should depend merely upon the place of his death.

Judgment affirmed.

Woolley & Buckner and O. A. Wehle for appellants.

Elliott & Hemingray for appellee.

GIBSON, &c. v. SUBLETT'S EX'OR.

(Filed March 10, 1884.)

Lex loci contractus—Married women—Where a married woman domiciled in another State has the right under the law of that State to bind herself by a promissory note, Held—The note would be binding on her everywhere, and if sued on in this State her real estate here might be subjected to its payment, although the note, if executed here, would not have been valid.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, executor of Lewis Sublett, deceased, brought this action to recover personal judgment against appellants, Tobias and Eva B. Gibson, husband and wife, and subject real property of the latter to the payment of his debt, which is evidenced by the following note executed in the State of Louisiana, the domicil of appellants:

"Tigerville, Terrebonne, La.

"We promise to pay to Mr. Lewis Sublett, of Versailles, Woodford county, Kentucky, the sum of seventeen hundred and fifty dollars, ten per cent. interest, in eighteen months from this day.

"TOBIAS GIBSON,
"EVA B. GIBSON."

The lower court rendered judgment against Tobias Gibson for one-half amount, less $50 previously paid, and for a sale of the property of Eva B. Gibson to satisfy the other half, but refused to render personal judgment against her.

By the terms of the note the obligors, according to the laws of Louisiana, which govern in interpreting the contract, are not severally bound for the whole, but each is bound, if at all,

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for one-half only of the amount. And in this respect the judgment rendered is clearly right.

It seems that under the laws of that State a married woman can not by contract bind herself for her husband, nor jointly with him for debts contracted by him before or during their marriage for his own, or the benefit of the community existing in virtue of the marriage. But she may bind herself by contract executed jointly with him by his authority when the consideration is for and enures to her separate advantage. Therefore, whether or not the wife is, according to the laws of Louisiana, bound by the note sued on in this case is a question of fact to be determined by the evidence.

At the time the note was executed appellants resided in Louisiana and Lewis Sublett resided in Kentucky. And the only evidence offered by appellee tending to fix the liability of Eva B. Gibson consists of letters written by her to Sublett.

From these letters it appears that a check for $1,700 was sent to her by him about the date of the note, $50 forming the balance of the consideration, but paid after the commencement of this action, having been loaned previously.

The letters show that the $1,700 was loaned at her urgent and persistent solicitation, for the purpose of enabling her to make an investment for her separate and exclusive advantage, and upon the faith of her promise to secure the payment to him by a mortgage upon a certain plantation in Louisiana, which she informed him the money loaned would enable her to buy, and also upon her real estate in Kentucky.

They show farther that after he sent the check her husband cashed it, and with the proceeds purchased and gave to her a note for $2,465, bearing 8 per cent. interest, and secured by mortgage on the plantation she expected to buy. And in one of the letters she stated to him in substance that whether she succeeded in becoming the owner of the plantation or not she had made a safe and profitable investment for her own separate advantage of the $1,700.

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No mortgage, however, was ever executed to Sublett, but a short time after she received the check the note sued on was executed and sent to him by her.

The statements in the letters, if credited, establish beyond controversy that the consideration of the note sued on enured to her separate advantage, and she is consequently bound for one-half the amount.

But the husband, Tobias Gibson, whose deposition was read in evidence, testifies that he cashed the check sent to his wife by Sublett, and with the proceeds paid an individual debt contracted by him in 1872, three years before the loan was made to her, and that no part of the money was received by her or enured to her benefit.

It is obvious that if the testimony of the husband be true the wife fraudulently obtained the money from Sublett, and was guilty of falsehood in stating it had been used to purchase the mortgage note for her benefit.

In our opinion the statements made by the wife should be credited rather than the testimony of the husband.

In the first place there is nothing in the record showing that the money was loaned upon the credit of or for the purpose of being used by the husband. On the contrary, it was obtained by the wife in the belief by Sublett it was for her exclusive accommodation and advantage, and upon the faith of her promise to repay it. If, therefore, her conduct was fraudulent, the husband not only connived at, but profited by it.

Second, the wife is not shown in any other way than by the testimony of her husband to have voluntarily acted in bad faith. But by his own deposition it is made apparent that he deliberately planned to cheat Sublett out of at least one-half the amount loaned to his wife. He testifies that he is a practicing lawyer in Louisiana, and acquainted with the laws of that State, and, therefore, must be presumed to have purposely so drawn the note sued on as to make himself liable for only one-half of it, though getting, according to his testimony, the benefit of the whole, while relieving and expecting his wife

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would be released altogether. And in furtherance of the scheme he answered the petition denying the right of appellee under the laws of Louisiana to recover of him more than one-half the note, and testified as a witness to facts which, if true, relieve his wife entirely. His conduct, therefore, has not been such as to entitle him to credit when contradicted by the statements of his wife.

Taking the statements made by Eva B. Gibson as true, the question arises whether her real property in Kentucky, in which she has a general estate, can be subjected to the satisfaction of one-half the note for which, according to the laws of Louisiana, she is bound.

By section 2, article 2, chapter 52, General Statutes, the real estate of a married woman is made liable for her debts and responsibilities contracted after marriage, on account of necessaries for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her. But the debt sued on in this case was not contracted for necessaries in the meaning of the General Statutes. Nor could her real estate be subjected to the debt in question in virtue of any express statute of this State.

The question then to be determined is whether, appellant being bound by the contract according to the laws of the State of Louisiana, where it was made, and consequently her real estate there being subject to the payment of it, her property here should be likewise made subject.

Her property would not be subject if the note had been executed here, because under the laws of this State she is not capable of binding herself at all by a contract like the note sued on. But it is a recognized rule that "as to acts done and rights acquired and contracts made in other countries touching property therein, the law of the country where the acts are done, the rights are acquired or the contracts are made will generally govern in respect to the capacity, state and condition of persons" (Story Conflict of Laws, section 102). And "if by the law of the place of the domicil of the husband a mar-

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ried woman has a capacity to sue, or to make a contract or to ratify an act, her acts so done will be held valid everywhere." (Ibid, section 66a.)

If then the contract is to be held valid and binding here because it is so in the State where it was made, it would seem to reasonably follow that her property here should be subject. For to hold that a valid and binding contract is not enforcible at any time, nor in any manner, is absurd.

As said in Hart v. Grigsby, 14 Bush, 544: "The power to make a contract necessarily subjects the person possessing the power to the obligations legally incident to the contract made in the exercise of that power."

In our opinion whenever it is ascertained and determined by judgment of courts that a contract made by a married woman in another State is valid and binding, as according to the rule founded upon comity between the States the contract in this case must be adjudged, the remedy provided for the satisfaction of judgments should be applied, as though the judgment was against a feme sole or a married woman invested with the rights and subject to the responsibilities of a feme sole.

As there is no assignment of error for the failure of the lower court to render personal judgment against Eva B. Gibson, it is not necessary to decide in reference thereto.

Judgment affirmed.

J. W. Gillespie for appellants.

Porter & Wallace for appellee.

NEW BOOKS.

Illustrations in Advocacy. Examples of conducting the Prosecution and Defense of Civil and Criminal Cases, including Methods of Cross-examination, also Cicero's Defense of Roscius for Murder, and the story of the Tichborne Trial retold. By Richard Harris. W. H. Stevenson, St. Louis, Mo., 1885. Price $1.50.

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Suell's Principles of Equity. By Edmund H. T. Suell. First American from the Sixth London Edition; by John D. Lawson. W. H. Stevenson, St. Louis, Mo., 1885. Price $5.00.

The fact that this work has gone through six editions raises a strong presumption in its favor. We have read several chapters in it with interest. The student will think it a good substitute for Story's two ponderous and diffusive volumes from which most of us got our first taste of equity.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT.

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Adverse Possession—

1. Void deed—When one enters upon land under an executory contract of purchase his possession is amicable so long as he looks to his vendor for title, but whenever a deed is made to him his possession becomes adverse, although the deed may be void and pass no title, provided he then ceases to look to the vendor for title and claims the land as his own.
2. Champerty—A possession may toll the right of entry and be adverse under the limitation act while it is not so under the law against champerty. Henderson, &c. v. Dupree, &c. March 21, 1885. Ballard Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. G. Bullitt and J. D. Wilds for appellants; Nichols & Hawes for appellees.

Agency—

Agent violating instructions—A mortgagee who had obtained a decree for the sale of mortgaged tobacco agreed that the mortgagor might take the tobacco to a particular warehouse for sale, the proceeds to be paid to the commissioner and credited on the judgment. The mortgagor employed negro men to take the tobacco to market and sell it for him and bring him the proceeds of sale, which they did, taking it, however, to a different warehouse from that designated by the mortgagee.

Held—That the title passed to the purchaser, nothing appearing to indicate that the agent was not clothed with a general authority to sell in the ordinary course of trade. Abernathy & Co. v. Nelson. Feb. 4, 1885. Todd Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Feland & Wood for appellants; Ben T. Perkins, Jr., for appellee.

Appeals—

1. Exceptions—It is not necessary to make any objection or exception to a final judgment in order to secure a reversal, nor does the fact that the appellant's counsel may have prepared the judgment affect the parties or their rights. Craycraft v. Duncan, &c. March 5, 1885. Carter Cir.

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Ct. Opin. by Pryor, J., Ct. Ap., aff. Botts & Davis for appellant; B. F. Bennett and Roe & Roe for appellees.

2. Want of jurisdiction—The consent of parties can not confer jurisdiction upon this court to revise a judgment from which no appeal has been granted. Dean v. Dean's Adm'r. February 4, 1885. Breckinridge Cir. Ct. Opin. by Richards, J., Sup. Ct., striking from docket. Lewis & Fairleigh and Kincheloe & Eskridge for appellant; G. W. Williams and J. A. Dean for appellee.

3. Amount in controversy—Appellant having judgment and return of "no property," sought to subject a fund in the hands of a garnishee. Appellee intervened and the fund was adjudged to him. Held—That the amount in the hands of the garnishee was the value in controversy, and that being less than $100 this court has no jurisdiction of the appeal. Beauchamp v. Miles. March 18, 1885. Marion Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. John McChord for appellant; J. B. Thompson for appellee.

Assignment for Benefit of Creditors—

1. Fraud—The fact that a deed of assignment for the benefit of creditors recites that some of the creditors are pressing the debtor and will so sacrifice his property as to make it impossible to pay all his creditors, does not manifest a fraudulent intention to hinder and delay creditors.

2. The fact that the assignee of a stock of goods employs the assignor in the store as a salesman is not a badge of fraud. Sachs, &c. v. Hess, &c. March 18, 1885. Hardin Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Bush & Robertson and Brown & Haycraft for appellants; James Montgomery for appellees.

3. Assignment by one partner—The assignment by one of two partners of all his property, including his interest in the firm assets, for the benefit of creditors, dissolves the partnership, the assignee and the other partner becoming tenants in common of the partnership property, and if firm creditors seek to subject the property by attachment to the payment of their debts it is not only the right of the assignee, but his duty, to prevent these creditors from thus withdrawing from his hands for their sole benefit what has been confided to him for the benefit of all alike, and in the discharge of this duty he may show as a reason why the attachment should not be sustained that it was obtained by collusion between the attaching creditor and the partner who has not assigned. Hobbs v. Merrifield's Ass'ee. March 25, 1885. Nelson Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. W. Thomas for appellant; John D. Wickliffe for appellee.

Assignment for Benefit of Creditors—

Assignee's action—Venue of—A conveyance of land in two counties, operating as a transfer for the benefit of creditors, authorized a proceeding in either county for the sale of the land and a distribution between creditors. The recording of the conveyance was not the act of insolvency, and it was, therefore, not necessary to sue in the county in which the

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conveyance was recorded. Adkinson v. Riley. March 10, 1885. Washington Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. P. B. Thompson, Sr., for appellant.

Assignor and Assignee—

Recourse—Diligence—In order that the assignee of a note may preserve his recourse upon the assignor he must commence suit at the first term of such court as has jurisdiction after the assignment and maturity of the notes, at which judgment might be obtained, and an assignee is required to take notice of the unusual jurisdiction of a police court in the county of the maker's residence, although he lives in another county. Potter & Co. v. Manion. March 11, 1885. Allen Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. W. E. Settle and E. W. Hines for appellants.

Attachments—

1. Priority of liens—Where the jurisdiction of the court depends upon the contingency of the defendant's subsequent consent, and the plaintiff has an attachmment levied before that consent is given, the act of consent, when given, may relate back so as to affect the defendant, but can not affect other liens already acquired.
2. Answer of garnishee—Lis pendens—The answer of a garnishee setting out the debt he owes the defendant creates a lis pendens affecting liens subsequently acquired, although the garnishee was not served with a notice specifying the debt sought to be attached. Shaw v. Carrick, &c., Ex'ors. February 4, 1885. Scott Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. W. S. Darnaby for appellant; James F. Askew for appellees.

Bail Bond—

Mistake in name—A person having been indicted under the wrong name and an order entered permitting "the defendant" to give bail, upon the correction by the court of the mistake in the name it was not necessary to repeat the order allowing bail, and the real culprit having been arrested, admitted to bail, tried and convicted, the mistake in the indictment, which was corrected before the bail bond was executed, is not available as a defense to the surety in the bond. Decker v. Commonwealth. February 4, 1885. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Haycraft & Slack for appellant; P. W. Hardin for appellee.

Billiard Tables—

What is—License—A rectangular table, with cushions on the sides, with four pockets, one in each corner, and on which games are played with cues and balls, is a billiard table within the meaning of the statute requiring license to be obtained to keep a billiard table. It is immaterial what games are played on the table; if kept for public use, and billiards, pool or any other game is played upon it, the party keeping it is guilty.

To own or have possession of a billiard table not used by the public is no violation of the statute.

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The judgment in this case is affirmed because the indictment fails to state a public offense, but the court holds that the defendant who kept what is now known as a pool table, upon which the game of pool alone was played, should have had license to keep a billiard table. Commonwealth v. Montedonico. March 12, 1885. Jefferson Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Basil W. Duke, A. G. Caruth, Kohn & Barker, James P. Helm and P. W. Hardin for appellant; Kinney & Kinney and H. Clay for appellee.

Bills and Notes—

Alteration—Where the acceptor of a bill of exchange for $3,000, executed for his accommodation, offered it for sale, and the bank declining to invest more than $1,500 in the paper, a credit of that amount was entered across the face of the bill and the balance less the discount paid to the acceptor, the entry of the credit was not such a material alteration of the bill as to release the drawers and indorsers; nor does the fact that the proceeds did not accomplish the purpose intended by the obligors release them, it not appearing that the holder was informed of that purpose before purchasing. Jett, &c. v. Farmers and Traders Bank. March 25, 1885. Daviess Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. G. W. Williams, and Weir, Weir & Walker for appellants; Owen & Ellis for appellee.

Boundary—

Long acquiescence—Where parties met upon land off of which one had agreed to sell the other a certain number of acres and fixed the division line, long acquiescence in the line so fixed, each party having been in possession of his portion so allotted for about fifteen years, forbids its now being disturbed. Finn v. Rochford, &c. March 14, 1885. Pendleton Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Clarke & Applegate for appellant; C. H. Lee for appellees.

Champerty—See Adverse Possession.

Common Carriers—

Express company—Special contract—Under a special contract by which it was provided that $50 was to be the limit of appellant's liability in case of "loss or damage" to a package intrusted to its care, as it does not appear that the package was either lost or damaged, but that it is still in the possession of the company's agent, the shipper is entitled to recover the value of the package and is not limited to the amount fixed by the contract. It is unnecessary for the court to pass upon the validity of the special contract. Southern Express Co. v. Gutman. March 18, 1885. McCracken Cir. Ct. Opin. by Richards, J., Sup. Ct., modifying a former opinion. Bigger & Reid, F. E. Whitfield, T. D. Young and Sachs & Sachs for appellant; W. D. Greer and C. S. Marshall for appellee.

Continuance—

Diligence in serving subpœna—The statement in an affidavit for a continuance that a subpœna has been issued for an absent witness does not

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show sufficient diligence, and the failure to place the subpœna in the hands of the proper officer for service is not excused by the statement that before the defendant could have it done he heard the proposed witness had left the State. It is not proper diligence to rely upon hearsay in such a matter.

2. Personal attendance of witness—The defendant was not entitled to a continuance on account of the absence of a witness, whose deposition he had taken under leave obtained from the court at the preceding term upon his affidavit that the witness was very old and physically unable to attend court, although the affidavit for a continuance stated that his personal presence in court was necessary that the defendant might obtain the full benefit of his testimony, nothing appearing to show that his condition had in any way changed from what it was when the leave was obtained to take his deposition. Davis v. Commonwealth. March 7, 1885. Woodford Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. P. B. Thompson, Sr., J. W. Gillespie and Porter & Wallace for appellant; D. L. Thornton and P. W. Hardin for appellee.

Contracts—See Trusts, 1—

1. Illegal—Remedy—Cancellation—While no action can be maintained either in equity or at law upon an illegal contract, it does not follow that no affirmative relief of any character can be granted in equity. If the contract is executory, its illegal character, if not apparent upon the face of it, will be grounds for cancellation in equity. Wilcox, Cope & Co. v. Buckner. March 4, 1885. McCracken Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., aff. L. D. Husbands for appellants; Thos. E. Moss for appellee.

2. Past cohabitation—While past cohabitation may not be sufficient to support an express promise in writing, unless it is a compensation for injured reputation by seduction or some particular hurt done, yet if the man, being in equal fault, vests in the woman title to personal property, it is quite a different matter when he seeks to recover it from her. Clark v. Doke's Adm'r. March 18, 1885. Nelson Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. C. Wickliffe for appellant; John A. Fulton for appellee.

3. Sale of goods—To be appraised—Misconduct of appraisers—Estoppel—Appellee sold to appellant his household, school and kitchen furniture, appellant agreeing to pay value of goods as fixed by appraisers, one selected by each party, these two to select a third man if necessary, "broken and useless" articles to be exempt from appraisement. Held—That if the appraisers improperly decided that certain articles were not "broken and useless," and placed too high a value on others, this fact alone can not justify the court in relieving appellant from his express promise to pay the valuation of the appraisers. Moreover, the appellant having accepted the articles without objection after each had been pointed out to him with the appraisement in his hands, he is now estopped to complain. Chenault v. Pinkerton, &c. March 11, 1885. Mad-

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ison Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. C. F. & A. R. Burnam for appellant; Caperton & Smith and John Elliott for appellees.

Conversion—

Measure of damages—In actions for conversion of personal property the value of the property at the time of its conversion, with interest, is the general and recognized rule for measuring damages. The plaintiff can not recover the value of the property and also the value of its use by the defendant. Levi, &c. v. Stallard. March 4, 1885. Jefferson Ct. Com. Pleas. Opin. by Ward, P. J., Sup. Ct., rev. Dupuy & Twyman for appellants; Kinney & Chatterson for appellee.

Costs—

Amending pleadings—If pleadings have to be amended or reformed the party in fault must pay the cost occasioned by his fault. Therefore, when the Court of Appeals reversed a judgment, with directions to permit the plaintiffs to amend their petition, the plaintiffs ought to have been compelled to pay all costs after the answer of the defendant up to the answer of the amended petition, although the Court of Appeals did not impose terms. Harwood, &c. v. Baldwin & Co. March 25, 1885. Kenton Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Hallam & Perkins for appellants; Fisk & Fisk for appellees.

County Levy—

Power of county court—A county court having made a sufficient levy to pay the interest for certain years upon railroad bonds issued by the county, its power to levy is exhausted, and it can not be required to make another levy. The fact that the plaintiff's interest bonds have been merged in a judgment does not preclude him from being paid out of the sum levied to pay all interest, of which his was part. Pitchford, &c. v. Foster. February 4, 1885. Allen Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wilkins & Sims and E. W. Hines for appellants; J. J. Gatewood for appellee.

Courts—

Construction of statute—The word "co-extensive," as used in an amendatory act declaring that the jurisdiction of a police judge "in said town and county" is "made co-extensive" with that of the judge of the quarterly court, means "concurrent," and was intended to increase the amount of which the court should have jurisdiction, and not to extend the territory within which that jurisdiction should exist, the jurisdictions being extended territorially by the phrase "in said town and county," having originally been limited to the town. Potter & Co. v. Marion. March 11, 1885. Allen Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. W. E. Settle and E. W. Hines for appellants.

Criminal Law—See Franchise—

1. Trespass and injury to property—The proper designation of the offense described in section 7, article 28, chapter 29, General Statutes, is "tres-

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pass and injury to property," but an indictment for the defense is not rendered bad by its designation of the offense as "malicious mischief."

2. Indictment—Where the words of a statute are descriptive of an offense, the indictment should follow the language, but the words "not with felonious intention" are not descriptive of the offense of "trespass and injury to property," and their omission from the indictment is immaterial. Commonwealth v. Sherman, &c. February 4, 1885. Johnson Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. P. W. Hardin for appellant.

Damages—

New trial for smallness of—A new trial can not be granted on account of the smallness of damages in any case where they cover the actual pecuniary loss sustained; and while the plaintiff in this case, if entitled to recover at all, was entitled to recover a greater amount than that fixed by the jury, yet as the decided weight of evidence tends to the conclusion that there was no such contract as was declared on, it can not be said that the damages assessed did not equal the actual pecuniary loss sustained by the plaintiff. Callahan v. Harris. March 31, 1885. Jefferson Ct. Com. Pleas. Opin. by Hines, Ch. J., Ct. Ap., aff. on original and cross appeal. Alpheus Baker and S. B. Toney for appellant; Chas. H. Gibson for appellee.

Depositions—

Where each party in an equitable action has given his deposition, and one of them dies before the trial, the deposition of the living party may be read, although the representative of the decedent refuses to introduce his deposition. Lear v. Smith's Adm'r. March 11, 1885. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Russell & Selecman for appellant; John W. Lewis for appellee.

Devise—

Defeasible fee—Under a devise of a defeasible fee the profits, unless otherwise disposed of by the will, remain the property of the first devisee and pass to his heirs or personal representative. (See original opinion. 6 Ky. Law Rep., 589, to which the court adheres, with the above addition.) Lynn's Adm'r v. Kennedy. March 31, 1885. Kenton Ch. Ct. Opin. by Hines, Ch. J., granting rehearing and rev. W. Lindsay and Simmons & Schmidt for appellant.

Dower—See Partnership, 1, 2—

1. Homestead included in estimating dower—In an action to foreclose a mortgage the wife of the mortgagor filed a petition claiming a homestead, the value of which was paid to her, the property being indivisible. In an action by her to recover dower in the same property after her husband's death she admitted that she had received the value of the homestead during her husband's life, and still had it. Held—That it would be unjust in allotting dower not to charge the widow with the value of the homestead thus adjudged to her upon her own petition, although received by her in her husband's lifetime.

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2. Rents—Receiver—When a widow is entitled to dower in property which is indivisible it is proper to appoint a receiver to rent it out for the purpose of allowing to the widow her one-third of the rents. Holloway's Ex'or v. Harris. March 31, 1885. McCracken Cir. Ct. Opin. by Holt, J., Ct. Ap., rev. L. P. Little, Joe McCarroll and Henry Burnett for appellant; Thomas E. Moss for appellee.

Estoppel—See Contracts, 3.

Evidence—

1. Conspiracy—Upon a charge of conspiracy in the commission of crime any fact which shows the relation of the parties charged with the crime, or which is necessary to introduce or explain another fact in issue, or which afforded an opportunity for any transaction which is properly in issue, may be proved, as may any fact which tends to show that facilities or motives existed for the commission of the crime, even evidence tending to prove a distinct offense may be admissible if it tends to show any of these things or is so connected as to form a part of one entire conspiracy.

   In this case, in which the defendants were charged as co-conspirators for the murder of the husband of one of them, the motive assigned for the crime being the obtention of insurance money, any circumstance which tended to show, however slightly, that the defendants were endeavoring to get control of the deceased and his property by agreement or concerted action was competent.

2. Expert testimony—The rule that requires that hypothetical questions asked of experts shall be based upon proved facts only does not require that the exact language of the witnesses be used, nor does it require that the questions shall be based upon facts conclusively established by the testimony; hypothetical questions can be based upon any state of facts that any of the testimony sustains, although there may be conflicting testimony. Davis v. Commonwealth. March 7, 1885. Woodford Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. P. B. Thompson, Sr., J. W. Gillespie and Porter & Wallace for appellant; D. L. Thornton and P. W. Hardin for appellee.

3. Declarations of agent—The statements of an agent bind the principal, if made while in the discharge of his duty, but recitals by the agent of past transactions to which he was not a party, and about which he could have no personal knowledge, are not competent against his principal, being simply hearsay. McCormick Harvesting Machine Co. v. Ripley. March 25, 1885. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., rev. N. Crutchfield for appellant; John Stites for appellee

4. As to transaction with decedent—A partnership agreement being lost, the statements of the attorney who drafted it as to its contents are competent against the widow of a deceased partner claiming dower, as are also the entries upon the partnership books.

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5. Refusal to produce books—The failure or refusal of a party to produce books which it is within his power to produce authorizes the conclusion that statements made by a skilled accountant who has examined the books, as to entries therein, are correct. Bowler, &c. v. Blair. March 7, 1885. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. John W. Stevenson, W. Lindsay and Benton & Benton for appellants; J. G. Carlisle and W. W. Cleary for appellee.

Exceptions—

1. Jurors are "bystanders"—Jurors trying a case are "bystanders" within the meaning of subsection 3 of section 337 of the Code.
2. Exceptions attested by bystanders—An exception the truth of which is attested by two bystanders, as provided by subsection 3 of section 337 of the Code, need not contain anything except the particular matter about which there is a difference of opinion. Dawson v. L. & N. R. R. Co. February 3, 1885. Bullitt Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., rev. F. P. Straus, W. R. Kinney and Charles Carroll for appellant; W. Lindsay and W. R. Thompson for appellee.
3. The appellant waived his exceptions to depositions by failing to have the court act upon them. Holmes, &c. v. Curtis, &c. March 19, 1885. Robertson Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Deming & Owens for appellants; Winfield Buckler for appellees.

Expert Testimony—See Evidence.

Forcible Entry and Detainer—

New trial—After judgment has been entered according to the inquisition on a forcible entry and detainer the judge or justice who presides has no power to disturb it; the only new trial provided for is by a traverse in the circuit court, which must be taken in three days. Scaggs v. Fife. February 4, 1885. Lawrence Cir. Ct. Opin. by Bowden, J., Ct. Ap., aff. Stewart & Stewart for appellant.

Franchise—

Raising dam—The county court having granted a privilege to erect a dam not to exceed a certain height, the grantee, by building his dam at a less height, did not forfeit the privilege, and is not liable to indictment for subsequently raising his dam to the height authorized by the grant. Cumberland River Lumber Co. v. Commonwealth. March 7, 1885. Whitley Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Wm. Lindsay for appellant.

Fraudulent Conveyance—

1. From father to son—A purchased land at decretal sale in his own name and executed bond for the purchase price, but the commissioner, by his direction, executed a conveyance to his two sons. In an action by a creditor of A to set aside the conveyance as fraudulent both A and his sons testified that the father acted as the agent of the sons in the pur-

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chase of the land, the sons being unable to execute bond, and that the sons had since satisfied the bonds, or reimbursed the father for what he had paid thereon.

Held—That although there are some circumstances connected with the transaction from which fraud might, perhaps, be inferred, they are not such as to outweigh the positive and uncontradicted statement by the father and his sons that the land was purchased in good faith, and paid for by the sons. Johnson, Rec'r v. Atherton, &c. March 16, 1885. Russell Cir. Ct. Opin. by Lewis, J., Ct. Ap., aff. Jeff. C. Johnson and Sweeney & Sons for appellant; Charles Eaves for appellees.

2. Knowledge of grantee—In order that a transfer of property may be set aside upon the ground that it was made for the purpose of defrauding creditors, the purchaser must be chargeable with notice of the vendor's intention; but this may be established not only by proving direct and positive information on the part of the purchaser, but it may be inferred from the existence of such facts as would place a man of ordinary prudence on inquiry with reference to the conduct of his vendor. Wiseman, &c. v. McAlpin, Polk & Co., &c. March 25, 1885. Opin. by Richards, J., Sup. Ct., aff. D. D. Sublett and J. & J. W. Rodman for appellants; W. C. Ireland and W. S. Harkins for appellees.

Garnisment—

Service on agent—No lien—A lien can not be created upon debts by garnishing an agent or attorney having in his hands for collection the notes and accounts by which the debts are evidenced; all that the agent or attorney can be required to do is to surrender the notes and accounts, which will not create a lien on the fund which other persons owe. Hobbs v. Merrifields' Ass'ee. March 25, 1885. Nelson Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. J. W. Thomas for appellant; John B. Wickliffe for appellee.

Homestead—See Dower, 1, 2—

1. As against mortgagees—In enforcing a mortgage which does not cover the homestead, the fact that a senior mortgage covers the entire land, including the homestead will not authorize the chancellor to sell so much of the land, including the homestead, as is required to satisfy the senior mortgage, and then subject what it left to the payment of the other mortgage. If the land, exclusive of the homestead, is sufficient to satisfy the senior mortgage, the debtor is entitled to the exemption as against the junior mortgage; or if not sufficient, he is entitled to what remains of the homestead. Buckner & Terrell, For Use, &c., v. Samuels, &c. March 14, 1885. Crittenden Cir. Ct. Opin by Pryor, J., Ct. Ap., rev. Feland & Wood for appellants; Petrie & Littell for appellees.

2. Infant children are entitled to a homestead in the land of their deceased father as against either creditors or his adult children, although he left

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no widow. Higginbotham, &c. v. Meadows. March 26, 1885. Russell Cir. Ct. Opin. by Holt, J., Ct. App., aff. J. Knox Frazer for appellants; Montgomery & Jones for appellee.

8. Removal—Intention to return—A debtor can not claim that the proceeds of land are exempt upon the ground that they are the proceeds of his homestead when he was not residing on the land at the time it was sold, unless his removal was merely temporary and there was an actual intention to return and occupy it as a homestead. His intention to return to it, if he did not sell with a view of buying another homestead, is not sufficient. Hall, &c. v. McGlothlin, &c. March 21, 1885. Simpson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. M. Gorin and G. H. Galloway for appellants; G. W. Roark and I. H. Goodnight for appellees.

Husband and Wife—

1. Rights of husband's creditors—Where there has been a complete conversion and reduction to the husband's possession of the wife's estate without any agreement upon his part to indemnify her, subsequent transfer of property by the husband to the wife for the purpose of indemnifying her is not good as against prior creditors of the husband. Hall, &c. v. McGlothlin, &c. March 21, 1885. Simpson Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. M. Gorin and G. H. Galloway for appellants; G. W. Roark and I. H. Goodnight for appellees.

2. Alimony—In this action by the wife against the husband for alimony it appears that the plaintiff was an "industrious, frugal, kind and affectionate" wife; that the defendant was cross and cruel to her, and that, after submitting to it for years, she was forced to leave him. It further appears that the defendant is worth about $1,000, is badly crippled and almost helpless. The court allowed the wife the sum of $350, to be paid in ten installments, six months apart, without interest, and kept control of the case so as to stop payments in case of reconciliation or death of the wife. That judgment is affirmed. Holt v. Holt. March 18, 1885. Carter Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. D. Jones and A. Duvall for appellant.

Injunctions—

Damages on bond—Attorney's fees—The only attorney's fees recoverable as damages in a suit upon a bond to procure a temporary injunction are such as have been incurred in the attempt to get rid of the temporary injunction. Therefore, where the temporary injunction has been dissolved upon motion, attorney's fees incurred in the action after the dissolution are not recoverable as damages. So if the defendant in the injunction suit disregarded the temporary injunction and only contested the plaintiff's right to have the perpetual injunction upon the final hearing, his counsel fees were not occasioned by the temporary order, and are not recoverable as damages. Reading, &c. v. Davis. March 4, 1885.

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Franklin Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Geo. C. Drane, and Frank Chinn for appellants; John W. Rodman for appellee.

Instructions—

1. Oral—The fact that the court said to the jury, not in writing, after the argument of counsel: "Gentlemen of the jury: You will bear in mind that you are to try this case according to the law and evidence; remember you have been sworn to try this case according to the law and evidence. That is all; now you can retire to your room and answer the questions propounded;" could not have prejudiced the legal rights of appellant. Huntzicker's Adm'r v. Pennsylvania Co. March 21, 1885. Jeff. Ct. Com. Pleas. Opin. by Lewis, J., Ct. Ap., aff. M. A. & D. A. Sachs for appellant; Chas. H. Gibson for appellee.

2. Some correct, others erroneous—The giving of a wrong instruction is not cured by also giving a correct one in regard to the same matter; it is not the case in which one is obviously modified by another, but in which the jury is left to select between two independent and conflicting propositions. L. & N. R. R Co. v. Murphy. March 11, 1885. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wm. Lindsay and Hill & Alcorn for appellant; Welch & Saufley for appellee.

Judgments—

1. Reversal—Restitution—Ordinarily, where there is no supersedeas, the plaintiff recovering in his fiducial capacity and paying out the money before a reversal of the judgment will not be personally responsible, but only liable to the extent of assets in his hands unadministered, but a trustee having paid out the money to his attorneys under a contract by which he is not to be responsible for costs, damages or attorneys' fees, the attorneys, in other words, to stand between him and danger, they must be regarded as holding the money for him, and he should be compelled to refund it; but having received no interest on the money, he should not be charged with interest.

2. Reversal—Purchaser at execution sale—The plaintiff, in an execution, having purchased an equity of redemption sold under the execution, the reversal of the judgment deprived him of any right to enforce the lien acquired by his purchase, and left the defendant with his land in possession, as if no sale had been made. Shultz's Ass'ee v. Beatty. March 5, 1885. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Reid & Stone for appellant; J. J. Cornelison for appellee.

3. Erroneous—The court having jurisdiction of the subject-matter of the action and of the person of the defendant, its judgment is not void, and can not be set aside at a subsequent term. Any error in the judgment can only be corrected by appeal. Hardin v. Hardin, &c. March 17, 1885. Taylor Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. E. & S. A. Russell for appellant; Wm. Lindsay for appellees.

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Judicial Sale—

1. A judicial sale will not be set aside unless the purchaser is before the court.

2. Neither a want of proper description of the property in the petition and commissioner's report, nor a mere defect in the pleadings, will render a sale void. Buckner & Terrell, For Use. &c. v. Samuels, &c. March 14, 1885. Crittenden Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. J. W. Blue for appellants; W. Lindsay for appellees.

3. Collateral attack on judgment—Authority of attorney—An innocent purchaser is not affected by the fraud of the plaintiff's attorney and those acting with him in the procurement of the judgment, and the court will not, in a collateral attack upon the judgment, investigate the authority of the attorney to act, when the record shows that he instituted the action and prosecuted it to judgment, and that the parties under it obtained their money, although it may appear that the same attorney was acting for others whose interests were adverse to the plaintiffs'. Botto, &c. v. Botto, &c. March 5, 1885. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. Elliott & Hemingray for appellants; James S. Pirtle for appellees.

Landlord and Tenant—

1. Assignment of lease—Rent—If a lessee assigns his term to another, and the assignee accepts, he thereby makes himself liable for the rent which his assignor had agreed to pay.

2. Assignment presumed--Anyone in the occupation of lease-hold premises under the lessee will be presumed to be an assignee of the lease in favor of the lessors.

3. Assigning over—An assignee of a lease may always discharge himself from liability for subsequent breaches, both as regards rent and other covenants, by assigning over, even though it be done for the express purpose of getting rid of his responsibility. In this case, therefore, the new firm was liable for rent only up to the time they assigned the lease.

4. Partial assignment—To divest himself of all responsibility an assignee must assign all his estate; otherwise he will be liable on a covenant to pay rent as to the part of the premises of which he retains possession.

Judge Bowden in a separate opinion holds that the lease did not pass to the new firm under the articles of partnership, and that that firm was liable for rent only for the time they retained possession. Muldoon, &c. v. Hite. Hite v. Cobb. March 18, 1885. Lou. Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Richards, J., not sitting. First case aff. by equal division of court. E. F. Trabue for Cobb; Isaac Caldwell and G. A. Winston for Hite.

Local Option—

Indictment—An indictment charging the defendant with a violation of the "local option law of Leitchfield," and alleging that the "voters of

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said town at the August election, 187--, had voted against the sale," etc., was defective, and a demurrer thereto should have been sustained. The court knows no such law as that named, and whether the election was held before or after the passage of the act commonly known as the local option law is not stated, nor is it stated under what law it was held, as ought to have been done if the election was held before the passage of the act commonly known as the local option law. Merrill v. Commonwealth. February 4, 1885. Grayson Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. G. W. Stone for appellant; P. W. Hardin for appellee.

Mandamus—

Abandonment of motion—If a petition in equity and a summons thereon to appear on the first day of the term and answer the petition can authorize the court to award a mandamus, the summons must be considered as naming the first day of the term as the time at which the motion will be made, and the failure to make the motion at that time must be regarded as an abandonment. Pitchford, &c. v. Foster. February 4, 1885. Allen Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wilkins & Sims and E. W. Hines for appellants; J. J. Gatewood for appellee.

Married Women—

1. Personal judgment—It was improper to render personal judgment upon a note executed by a married woman, although she had become discovert by divorce before the date of the judgment.
2. Petition taken for confessed—The allegations of a petition against a married woman, in the absence of a denial, are to be taken as true, especially when she had been divorced and was sui juris at the time of the submission, at any time before which she had the right to file her answer. Hughes, &c. v. Nash. March 10, 1885. Henry Cir. Ct. Opin. by Holt, J., Ct. Ap., rev. Pryor, J., delivering separate opinion. Carroll & Barbour for appellants.

Measure of Damages—See Conversion; Railroads, 2; Warranty.

Negligence—

One riding a horse—Horse becomes unmanageable at sight of train—Duty of train employes—Where the horse of one riding near a railroad was struck by one of the cars of a moving train and the rider thrown to the ground and injured, in an action by the injured person against the railroad company to recover damages it was error to instruct the jury that if they believed from the evidence that the agents of the defendant in charge of the train did see, "or by the exercise of ordinary diligence could have seen, the horse of plaintiff, and that he was unmanageable, running toward the crossing, in time to have enabled them, by the use of means consistent with their own safety, to avoid such a collision, and that such means were not employed by said agents, they should find for the plaintiff." Those in charge of the train had the right to suppose

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that if anyone was riding in the field he was able to take care of himself and would exercise ordinary care to prevent being injured; they were under no obligation to look over the field in order to see that the plaintiff was not in the negligent act of putting himself in the way of danger. L. & N. R. R. Co. v. Murphy. March 11, 1885. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wm. Lindsay and Hill & Alcorn for appellant; Welch & Saufley for appellee.

New Trial—See Damages—

1. Time for making motion—A motion for a new trial must be made within three days after the verdict. A delay in entering judgment on the verdict does not extend the time within which the motion can be made. McCormick Harvesting Machine Co. v. Harned. March 18, 1885. Christian Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Joe McCarroll for appellant; Campbell & Gaither for appellee.
2. Inconsistent motion—A party by making a motion for a new trial upon the ground that the verdict is not sustained by the evidence, of necessity abandons any previous motion made by him to have a judgment entered on that verdict in his behalf, the two motions being inconsistent. Owensboro Water Co. v. City of Owensboro. March 11, 1885. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Sweeney & Sons for appellant.

"No Property"—See Venue.

Parent and Child—

Maintenance—One who was not the keeper of a tavern or of a house of private entertainment having taken his mother to his house for the purpose of taking care of her, without any contract for compensation, is held not to be entitled to recover anything therefor. Wells, &c. v. Weaver. Jones, &c. v. Weaver's Adm'r. February 4, 1885. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. G. G. Gilbert and T. S. Crutcher for appellants; Thos. J. Barker and J. S. Morris for appellees.

Partnership—See Evidence, 4; Pleading, 2—

1. Real estate—Dower—Real estate purchased for partnership purposes, and paid for with partnership funds, becomes partnership property, and the widow of a deceased partner can not claim dower until the partnership debts have been paid and the rights of the partners in the partnership estate determined; and the fact that each partner took a separate deed to his undivided interest in the real estate thus purchased does not show conclusively that it was not the intention of the partners that it should become partnership property, the sole object in having separate deeds being to enable each partner to obtain credit that he supposed he would not otherwise have. Nor is the fact that one of the partners mortgaged to the other the interest thus separately conveyed to him to secure to the mortgagee the amount paid by him in excess of his share of the purchase money, and also to secure to him the one-half of any loss that might be sustained in the partnership, sufficient to show that

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the property thus mortgaged did not belong to the partnership, the use of the property for partnership purposes, the entries upon the partnership books, and the testimony as to the contents of the partnership agreement, which was lost, all showing that the realty was partnership assets and belonged as much to the one partner as the other.

2. Dower—Where no partnership exists when real estate is purchased the subsequent appropriation of the property to partnership purposes will not bar the widow of dower. Bowler, &c. v. Blair. March 7, 1885. Kenton Ch. Ct. Opin. by Pryor, J., Ct. Ap., rev. John W. Stevenson, W. Lindsay and Benton & Benton for appellants; J. G. Carlisle and W. W. Cleary for appellee.

Patents—

Land previously surveyed—As the land covered by the patent under which appellant claims had, when the patent was obtained, been previously surveyed, and was not in fact vacant land, the patent can not avail appellant. Moreover, the proof shows that the land in contest is part of a tract purchased by appellee at commissioner's sale. Gardner v. Jackson. March 12, 1885. Warren Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Rodes & Settle and Wilkins & Sims for appellant; Wright & McElroy for appellee.

Pensions—

Exemption—Pension money is exempt only until it reaches the hands of the pensioner. Land purchased with it by the pensioner is liable for his debts. Herreld v. Skillem's Ass'ees. March 12, 1885. Ohio Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Walker & Hubbard and H. P. Taylor for appellant.

Pleading—

1. Prayer—Relief—In this action by appellant to enjoin the execution of a writ of possession, the prayer of the petition being not only for an injunction, but for the enforcement of an alleged agreement of the defendant to buy the land for the plaintiff, and that the plaintiff's title be quieted, it was proper for the chancellor to settle the rights of the parties to the land by his judgment. Gardner v. Jackson. March 12, 1885. Warren Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Rodes & Settle and Wilkins & Sims for appellant; Wright & McElroy for appellee.
2. Inconsistent defenses—In an action to settle a partnership the defense that there was no partnership in fact, and the defense that no partnership could lawfully exist by reason of the fact that the defendant was in the revenue service of the United States, were not inconsistent. Facts showing that an alleged contract was void may be specially pleaded in connection with a traverse. Lear v. Smith's Adm'r. March 11, 1885. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Russell & Selecman for appellant; John W. Lewis for appellee.
3. Insufficient denials—In an action for the unlawful seizure and conversion of a horse, wagon and harness, a denial by the defendant that the plaintiff was the owner of the horse, wagon and harness" is not a

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sufficient denial of the plaintiff's ownership of the property; nor is the denial that the defendant "unlawfully seized" the property a sufficient denial of the seizure. Such denials do not go to any specific allegation and, therefore, do not put anything in issue. Akin v. Gooch, &c. March 25, 1885. Logan Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. S. Galloday and E. W. Hines for appellant; Browder & Edwards for appellees.

Power of Attorney—

1. Power of attorney—Failure to record—While a deed executed by an attorney in fact is not effectual as a recorded instrument against creditors and purchasers unless the power is also properly acknowledged and recorded, it can not be avoided by the grantor, although the power be not recorded.
2. Revocation of power—The title of a purchaser from an attorney in fact is not affected by the fact that the power of the attorney had been revoked at the time of the purchase unless the purchaser had notice of the revocation, or had just ground to presume a revocation. Flannery v. O'Brien. March 18, 1885. Garrard Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Denny & Tomlinson for appellant; H. C. Kaufman and Burdett & Walton for appellee.

Practice in Civil Cases—

1. Trial by judge—Motion for new trial—When in an ordinary action a jury has been waived and the law and the facts submitted to the court in the absence of a motion for a new trial the only inquiry involved upon appeal is whether the pleadings and evidence are sufficient to support the judgment. And the fact that the court in its judgment, without being asked to do so, separated the facts found from the conclusions of law makes no difference, the motion must still be made (Helm v. Coffey, 80 Ky., 176). Henderson, &c. v. Dupree, &c. March 21, 1885. Ballard Cir. Ct. Opinion by Holt, J., Ct. Ap., aff. W. G. Bullitt and J. D. Wilds for appellants; Nichols & Hawes for appellees.
2. Election between defenses—The court having improperly required the defendant to elect upon which of two defenses he would rely, properly permitted him to amend his answer so as to present the defense he had abandoned under the compulsory order of election. Lear v. Smith's Adm'r. March 11, 1885. Washington Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Russell & Selecman for appellant; John W. Lewis for appellee.
3. Assignment of errors—An assignment as error that the court entered judgment against the defendant on the special findings does not raise the question whether the evidence justified the verdict, but whether the verdict authorized the judgment. L. & N. R. R. Co. v. Collins. March 4, 1885. Franklin Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Ira Julian for appellant; J. W. Rodman for appellee.
4. Pleading orally forbidden by Code—Oral agreement of counsel—This action was originally brought in the quarterly court and thence ap-

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pealed to the circuit court. The bill of exceptions in the latter court shows that it was admitted there by both parties that a new contract was made by them after judgment in the quarterly court and that it was orally agreed between them that it might be given in evidence by either party without being set up by written amendments. Held—The Code requires parties to plead in writing to an issue, and this can not be abrogated by oral agreements made after the commencement of the action. McCormick Harvesting Machine Co. v. Harned. March 18, 1885. Christian Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Joe McCarroll for appellant; Campbell & Gaither for appellee.

Railroads—See Negligence—

1. Killing of stock—As the statute makes the killing of stock by a railroad train prima facie evidence of negligence, in an action against the company for the killing, the defendant having admitted the killing and the value of the stock, the plaintiff needed no finding of fact to support his claim, and the defendant having failed to secure such findings as would relieve it from the imputed liability, judgment for the plaintiff followed as a matter of course. L. & N. R. R. Co. v. Collins. March 4, 1885. Franklin Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Ira Julian for appellant; J. W. Rodman for appellee.
2. Measure of damages—In an action against a railroad company for damages resulting from its failure to stop its train of cars at a station long enough to allow a passenger to get off the complainant is entitled to recover for mental and physical suffering which is the direct and immediate consequence of the wrongful act, and exemplary damages may be recovered when there is oppression, fraud, malice, insult or other willful misconduct evincing a reckless disregard of consequences. Dawson v. L. & N. R. R. Co. February 3, 1885. Bullitt Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., rev. F. P. Strauss, W. R. Kinney and Charles Carroll for appellant; W. Lindsay and W. R. Thompson for appellee.

Release—

Effect of relasing one of several debtors—While it is true that if two or more are jointly bound or jointly and severally bound, and the obligee releases to one of them, all are discharged, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, can not reasonably be supposed to have intended a release, it will be construed as only an agreement not to charge the person or party to whom the release is given, and will not be permitted to have the effect of a technical release. The circumstance that the act done by the obligee is assented to by the other obligor, upon the understanding that he remains bound, and that it is exact justice as between the discharged obligor and the obligor not discharged, is entitled to great consideration. Newcomb, &c. v. New-

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comb., March 25, 1885. Ohio Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. W. F. Gregory for appellants.

Sales of Personal Property—

Incomplete sale—T. sold to B. his undivided one-half interest in a growing crop of tobacco at eight cents per pound, binding himself to deliver the tobacco in good shipping order at B.'s warehouse in the following spring, reciting in his written contract that he had received $150 cash on his crop to enable him to save it, the balance, if any, to be credited on a note he owed B.

Held—That there was not a completed sale of the tobacco, and that the title did not pass. Under the contract the seller would have had to sustain the loss from drouth, frost, fire or other casualty, and, therefore, continued to be the owner. Dye v. Bramel. March 4, 1885. Robertson Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. B. G. Willis, W. Buckler and W. W. Kimbrough for appellant.

Separate Estate—

1. Action to subject—In an action to subject the separate estate of a married woman the allegation in the petition that the property sought to be subjected "is her separate estate" is sufficient, without alleging the facts showing it to be her separate estate.
2. Necessary averments—In such an action the statements in the petition that the property described is the wife's separate estate; that the loan was made to her for her benefit; that she intended to charge the property with it, and that it was then so understood and agreed, are sufficient to support a judgment subjecting the property. Hughes, &c. v. Nash. March 10, 1885. Henry Cir. Ct. Opin. by Holt, J., Ct. Ap., rev. Pryor, J., delivering separate opinion. Carroll & Barbour for appellants.

Statutory Construction—See Courts.

Taxation—See County Levy.

Trusts—

1. Beneficiary relieved of oppressive bargain—Appellant, having a legacy in the hands of a trustee, her uncle, to be invested for her benefit, and being desirous of retaining her home, which was about to be sold for her husband's debts, her trustee consented to purchase it for her, and her legacy failing to pay for the land by about one-third of the purchase price he paid the balance himself, and after several years conveyed to her the land, taking the note of herself and husband for a sum made up of the one-third of the purchase price, with 10 per cent. interest from the date of the original contract and the attorney's fee paid in the suit against the husband, the note to bear 10 per cent. interest until paid, payable annually, and if not paid to become principal and bear a like rate of interest. In an action upon the note, Held—That, considering the relation of the parties and the nature of the transaction between

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them, the appellant should be relieved of the oppressive bargain and required to pay only what the legacy lacked of paying for the land, with 6 per cent. interest from the date of the original contract. Cox, &c. v. Roach. March 12, 1885. Christian Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. Feland & Wood for appellant; Petrie & Littell for appellee.

2. Certain declarations did not constitute a trust—The declarations of the holder of certain shares of stock that he had bought the stock to benefit appellants, and that after he should be repaid the purchase price, with interest, he intended they should have the stock, are not sufficient, in the face of other facts recited in the opinion, to raise a trust for the benefit of appellants. Ormsby's Gd'n v. Sherley's Ex'or. March 5, 1885. Lou. Ch. Ct. Opin. by Hines, Ch. J., Ct. Ap., aff. Alpheus Baker, Wm. Lindsay and S. B. Toney for appellant; Goodloe & Roberts, A. P. Humphrey and E. E. McKay for appellee.

3. Trustee using trust property for his own benefit—An executrix delivered to her son a note which she held as part of the estate entrusted to her, in consideration that he would support her. Held—In an action by the devisees under the will against the son that he took no title to the note. He had notice (being a devisee also) that the executrix held the note as part of the estate, and, therefore, knew that she could not use it for her own benefit. Wells, &c. v. Weaver. Jones, &c. v. Weavers' Adm'r. February 4, 1885. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. G. G. Gilbert and T. S. Crutcher for appellants; Thos. J. Barker and J. S. Morris for appellees.

Trustee—As to his liability for paying out money under judgment afterwards reversed, see Judgment.

Vendor and Vendee—

1. Defective title—Right to recover purchase money—As the vendees had at the date of the judgment been in the actual, adverse and continued possession of the land purchased by them for more than twenty-five years, and the vendor himself had possession for sometime previous to the sale, it was not incumbent on him or his representatives and heirs after his death to show a connected title to the Commonwealth in order to enforce the lien for the purchase money.

2. The vendee should not be compelled to take or pay for any land that the vendor has not the ability at the date of the judgment to give him a good title to the possession of. Moore, &c. v. Bush's Heirs. March 14, 1885. Breathitt Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. W. L. Hurst for appellant.

Venue—

Action on return of "no property"—"The defendant" referred to in section 70 of the Code, which requires an action upon a return of "no property found," pursuant to section 439, to be brought in the county in

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which the judgment is rendered or in which the defendant resides or is summoned, is the execution defendant, and not such of his debtors as may be made defendants. Shaw v. Carrick, &c., Ex'ors. February 4, 1885. Scott Ct. Com. Pleas. Opin. by Bowden, J., Sup. Ct., aff. W. S. Darnaby for appellant; James F. Askew for appellees.

Warranty—

Measure of damages for breach—In actions for deceit or breach of warranty in sales the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be. Sanders v. Brooks. March 25, 1885. Greenup Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Roe & Roe for appellant; E. F. Dulin for appellee.

Water Courses—

1. Navigability—Judicial knowledge—It can not be assumed that such a stream as Straight creek, in Bell county, is, as a matter of fact, navigable, although courts might take judicial knowledge of the fact in regard to streams of more public importance.
2. Rights of riparian proprietors—Where one owns the bed of a stream not navigable, and the land on both sides, he may use the water as a motive power by diverting it and returning it to the stream before reaching the next proprietor, or by placing a dam across the stream unless he thereby works an injury to another, and having exercised this right, one who injures his mills or dam by floating logs in the stream is liable to him in damages therefor. Hoskins v. Archer, &c. March 4, 1885. Bell Cir. Ct. Unthank, Dishman & Hurst for appellant; Wm. Lindsay for appellees.

Witnesses—

How contradicted—The court adheres to the law as announced in its former opinion (6 Ky. Law Rep., 457), but holds the evidence to be competent which it there refused to consider, having overlooked an important statement of the witness sought to be contradicted. Walker, &c. v. Smith, &c. March 14, 1885. Henderson Cir. Ct. Opin. by Hines, Ch. J., Ct. Ap., granting rehearing and aff. Wm. Lindsay and H. F. Turner for appellants; Vance & Merritt for appellees.

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The Kentucky Law Reporter

EDITORS:

HORACE C. BRANNIN . . . . . Louisville, Ky.
EDWARD W. HINES . . . . . Frankfort, Ky.

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CURRENT TOPICS.

The next annual meeting of the State Bar Association will be held in July at Crab Orchard Springs. The following are the officers for the year: Wm. Lindsay, Frankfort, President; John W. Finnell, Covington, First Vice-President; R. P. Jacobs, Danville, Second Vice-President; Jas. A. Beattie, Louisville, Treasurer; Executive Committee, W. O. Harris and Thos. Speed, Louisville, and D. H. French, Lagrange; H. C. Brannin, Louisville, Secretary.

A daily newspaper sent the following answer to a young farmer boy's inquiry as to how he could succeed at the bar: First, get employment as corporation counsel; second, make a lucky hit in a criminal case; third, stand in with the judge and don't be over scrupulous; fourth, get a reputation for being able to break up a witness. The Central Law Journal says: What a mess of pernicious nonsense! No lawyer ever wrote it. To be a corporation lawyer is a dire misfortune to the beginner. It puts him in a rut and shelves him forever except as a mere money getter. As to the lucky hit in a criminal case, it does not come by accident. It is the genius of taking pains to get filled with the evidence. Good evidence is

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the best luck a lawyer can have. As to the unscrupulous lawyer, he never has any permanent success. His unscrupulous methods always bring contempt sooner or later. The lawyer who claims to stand in with the court is a rascal that any judge will repel as soon as he knows of his claim. And as for breaking up witnesses, the Irish girl's remark, "and phwat would I be doing all that toime," applies aptly.

It is an interesting question in this State how far a transfer or conveyance of her property by a woman, made in the interval between her engagement and her marriage, is in fraud of her husband and can be set aside by him. It is agreed that if the conveyance is made, without any knowledge or consent whatsoever on his part, it is fraudulent as to him. For when he enters into a contract to marry he is presumed to reckon on such estate as she possesses as a means of enabling him to meet the responsibilities of the marriage relation, and it is a fraud on him for her to convey it away. If she conveys to one who pays an adequate consideration and buys in good faith, such a one would be an innocent purchaser and could not be disturbed by the husband, but if the purchaser were a mere volunteer and paid nothing, the husband, having received no notice, could set aside the conveyance as fraudulent. But there is some difficulty in the following state of case: Suppose the intended husband knows nothing of the deed at the time it is executed, but is afterwards told of it, and yet completes his contract and marries the woman. Is the marriage a ratification of the deed?

In Hobbs v. Blandford, 7 Monroe, 469, it was held the marriage was not a ratification. But this case was afterwards overruled in Cheshire v. Payne, 16 B. Mon., 498, though it appeared that the husband in that case was notified of the deed only a few minutes before the performance of the marriage ceremony. The overruled case is the better doctrine since it is admitted that the making of the deed before marriage, when

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the husband was ignorant of it, is a fraud on him, and the giving notice to him afterwards could not help the matter. The doing of a fraudulent act is never justified by informing the injured party of it after it has been done. It is better and fairer always to obtain the intended husband's consent prior to making the deed; and if this is neglected all voluntary conveyances by the woman should be considered fraudulent as to him.

It has been computed that $4,221 is the average salary of a chief justice of a Supreme Court or Court of Appeals in this country, and $4,100 the average salary of the associate justice, and $3,158 the average of the circuit judge. In New York about $1,200 is added for expenses, and in New York City the salary is $15,000.

A Chinaman recently petitioned a Chicago court to allow him to adopt a child of American parentage. The court refused upon the ground that the adoption would not be for the ultimate benefit of the child.

If a sovereign is given to a cabman by his fare, both parties believing it to be a shilling, and an hour later the cabman discovers the mistake and keeps the sovereign, has he stolen it? The argument of this question before the Court for Crown Cases Reserved last week afforded excellent entertainment to a professional audience. The difficulty is that to "take and carry away animo furandi" is an essential part of the common law definition of larceny, and that in this case the cabman did not form a felonious intention about the sovereign when he took it and carired it away, because he then believed it to be a shilling. On behalf of the Crown it was urged that either he took it when he knew it was a sovereign, or the felonious intention which he subsequently formed relates back to the

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time when he took it. Before the argument had gone far it was apparent that the five judges who were hearing the case were not agreed, and while Lord Coleridge had no doubt that the sovereign was stolen, Mr. Justice Stephens was equally positive that it was not. Mr. Justice Cave further complicated matters by throwing out a suggestion that the cabman might perhaps have committed the statutory offense called larceny by a bailee. In the result the Lord Chief Justice announced that the bench was so seriously divided in opinion that there must be a further argument before the full court—that is, the whole Queen's Bench Division; so that the frequenters of the law courts will again be gratified by the most impressive legal spectacle left to us in these prosaic days, that of twelve or fourteen judges all sitting together to decide a question of criminal law.—St. James' Gazette.

The right of the courts to declare void and set aside any acts of the legislature which are in conflict with the Constitution is one of the most important and essential principles of our political system, and yet it is altogether peculiar to this country. No trace of any such idea is found in England (except in a dictum of Lord Coke); there is no decided case in which any act of parliament has been nullified. Nor does the jurisprudence of any other country show any trace of the principle. It has sprung up in this country and developed, within a hundred years, to its present strength until it is now one of the foundation stones of this government. It was first announced in a case in Rhode Island in 1782, was debated and finally adopted by the convention that framed the National Constitution, and was generally put in the State Constitutions. Though it is curious to remark that as late as 1808, in Ohio, the judges were impeached by the legislature for declaring one of their acts void, and as late as 1843 it was argued in the Supreme Court of Pennsylvania that the court had no right to hold an act unconstitutional. The growth and development

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of the idea is traced in an article in the American Law Review for April, entitled "Relation of the Judiciary to the Courts."

The American Law Review for April contains also articles on the Responsibility of the Pullman Car Company for Thefts from Passengers, by Mr. S. B. Toney, Louisville, in which he advocates the doctrine recently laid down in this State by Judge Richards, in the case of Pullman, &c., Co. v. Gaylord, 6 Ky. Law Rep., 279. III. Constitutionality of Railroad Commissions. IV. Unequal Taxation. V. Disposition of the Body after death.

The late Hugh MacCalmont, Earl Cairns, who was twice Lord Chancellor of Great Britain, was born in Ireland in 1819; was called to the bar in 1844; entered Parliament in 1852; was made Queen's Counsel in 1856; Solicitor General in 1858; Attorney General in 1866; Chancellor in 1868; and a second time Chancellor from 1874 to 1880. The following estimate is given of him by some of the English papers:

"The distinguishing characteristic of Lord Cairns' oratorical style was that he spoke to the reason and not to the passions; he never had recourse to misrepresentation or abuse, and always marshalled his own arguments in excellent order. Clearness of order, severity of argument, and appositeness of illustration were the main features of his speeches, which further attracted and commanded attention because they were delivered in a very eloquent and impressive manner. An English judge is never praised for integrity. That is taken for granted. Lord Cairns brought to the accomplishment of his task a profound knowledge of jurisprudence, an unerring grasp of facts, an instinctive faculty for separating the wheat from the chaff. He lightened the burdens of his office by giving up the solitary sittings of the Chancellor in his own court, and confining himself to the House of Lords, with occasional excursions into the

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Court of Appeal. He showed himself almost as much at home in the common law as in the principles of equity which he had been studying all his days. Lord Cairns' judicial demeanor was dignified, courteous, and cold. He listened patiently and always appreciated an argument. But he was seldom conciliatory and never genial. His notions were cut and dried. He had little sympathy with other people's opinions. Of humor he was totally destitute. Known to the nation at large as an eminent lawyer, statesman and judge, his lordship had also other claims to be remembered by his fellow countrymen. Although occupying the high and onerous position of Lord High Chancellor of England, he never relaxed to the last those benevolent and philanthropic efforts for which he was widely esteemed in all circles. Like his successor on the woolsack, Lord Cairns was not ashamed of being a Sunday-school teacher, and it is recorded of him that, when he was asked after his elevation whether he would not now be compelled to give up Sunday-school work, he emphatically answered: "Certainly not." Although deeply attached to the Evangelical principles of the Church of England, he was ready to co-operate on all occasions with other workers in the religious field. He appeared on many platforms in the metropolis as an advocate of measures, social and religious, for the amelioration of the masses; and with Lord Shaftesburg he shared the distinction of being the friend of the homeless "city arab."

He died on the 2d of April.

Judge Cooley, the well-known law writer, and for some years a judge of the Supreme Court of Michigan, has been recently defeated of a re-election to that court.

The Supreme Court of Oregon has just refused the petition of a woman to be admitted to the bar.

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The English Court of Appeals has recently held, in Brunsden v. Humphrey, where defendant negligently drove his wagon against plaintiff's cab, by which plaintiff was thrown out and the cab injured, plaintiff might sue for injuries to the cab, and after he had recovered judgment in that case he might bring a separate action for injuries to his person, which turned out to be more serious than he at first supposed. It was said by the court that the injuries to the cab and to the person, though occasioned both by the same cause, collision with the wagon, were yet different causes of action, as each must be sustained by different evidence. Lord Coleridge dissented on the ground that it was too much of a subtlety to say that if, by the wrongful act of another, one is injured in his arm and leg, he must bring one action for both injuries, but if, beside his arm and leg, his trousers which contain his leg and his sleeve which contains his arm are torn, he may bring two actions.

TO CROSS-EXAMINE WELL.

Think first what an icy pavement you tread upon; think how a willing witness may say too much that had been unproved without him; think how the rivet may be clinched and the strength redoubled by facts too often repeated and committed to memory; think how you may develop new theories for your adversary, and act with quiet discretion.

The act of cross-examination is to show a conflict of testimony. It may not be successful, yet, if skillfully worded, it will convince some one in the panel that you have at least moral evidence of the facts aimed to be established. It is not the place to exhibit smartness; that will be better if concealed. To entrap a false witness, to confuse a timid one, to encourage one who will aid your theory are good uses of this high art.

Most young lawyers think they appear dull if they pass a witness without "tearing him to pieces" under rigid questioning, and find that they have fed their enemy at every question.

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Older advocates use this weapon with tact and caution. They have tried the saber exercise too often, and remember the deep scars it produced on their clients.

Three kinds of witnesses may be shaken by cross-questions: First, those who swear recklessly; second, those who swear defiantly; and, third, those who swear falsely. The last named may be impeached, if he fails to impeach himself, by his own story. Only a few persons can continue long in telling falsehoods without detection.

The fine art of cross-examining is in making your case out of an opponent's witness. This is almost always done by a gentle and delicate leading process, coupled with a concealed kindness that fascinates and encourages, while it creates the reasonable doubt or supplies the broken threads of a story that you are seeking to establish.

Of all the men puzzled by cross-questions doctors are the most pliable. They deal in strange phrases and queer theories, and out of twenty or thirty about ten will admit that all men are at times a little unanchored in intellect. They will swear through a theory of vivid dreams, temporary insanity caused by jealousy, or prolonged litigation, by a quiet and well followed invitation.

There are no better rules on cross-examination than five: First, know what you need, and stop when you get it; second, risk no case on the hazard of an answer that may destroy it; third, hold your temper while you lead the witness, if convenient to lose his; fourth, ask as if wanting one answer when you desire the opposite--if the witness is against you, and reverse the tactics if he is more tractable; Fifth, treat a witness like a runaway colt, and see that he does not get too much the start of his master, and if he does, let go of the reins at the first safe turn in the testimony—but if you see any object to break his running, call the turn quickly. J. W. DONOVAN.

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NOTES.

A country editor received the following: "Dear sir: I have looked carefully and patiently over your paper for months for the death of some individuals I was acquainted with, but as yet not a single soul I care anything about has dropped off. You will please to have my name erased."

"Where the shoe pinches." The origin of this now common but expressive saying is taken from Plutarch's "Life of Emilius Paulus," where he relates the story of a Roman being divorced from his wife. "This person, being highly blamed by his friends, who demanded: Was she not chaste? Was she not fair? holding out his shoe, asked them whether it was not new and well made. "Yet," added he, "none of you can tell me where it pinches me." In other words, it is only those who experience or suffer the particular trouble complained of who know what it means.

Grant, Sherman, Buell, Beauregard and McClernand all differ in their accounts of the battle of Shiloh. Why not have it fought over again in the presence of a referee.—Detroit Free Press.

A Texas man, who has a mule for sale, hearing that a friend in a neighboring State wanted to buy a mule, telegraphed him: "Dear Friend: If your are looking for a mule don't forget me."

Barry Sullivan, the Irish tragedian, was playing in Richard III some years ago at Shrewsbury. When the actor came to the lines: "A horse! a horse! My kingdom for a horse:" some

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one in the pit called out: "Wouldn't an ass do you, Mr. Sullivan?" "Yes," responded the tragedian, turning quickly on the interrupter, "please come round to the stage door."

HILLMAN, BY, &c. v. HURLEY, &c.

(Filed March 24, 1885.)

1. Injunction to restrain trespass to land—Where plaintiff asks an injunction restraining defendant from committing a trespass on his land by cutting and removing timber, Held—(1) Plaintiff must have not only the right to possession, but also be in actual possession. (2) The injunction will not be granted unless defendant is insolvent, or the injury is irreparable, so adequate compensation can not be had at law.

2. Patent—Certainty of description—A patent for a certain number of acres of land "excluding all surveys of record in the above boundary," is invalid for indefiniteness.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

This action was brought to enjoin the appellees from cutting and removing timber from a certain tract of land.

The substantial averments of the petition are that the appellant is the owner and in the actual possession of the land; that the appellees have cut a large quantity of valuable growing timber thereon, worth $250, and have hauled away a portion of it; that they were then cutting and hauling it, and would continue to do so, whereby the appellant would suffer irreparable injury. It does not charge that the appellees are insolvent. The title and possession of the appellant is denied, but not the cutting and removal of the timber; and the appellees claim title to the land under patents junior to that of the appellant, which is not only shown by the testimony to cover the land, but it is so admitted.

It appears, however, that the appellant has never had the actual possession of the land, while the appellees have held that claimed by them under a marked boundary, and have, as the testimony tends to show, had some of it inclosed for about ten years.

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It is a general rule that the remedy by injunction does not lie to prevent a mere trespass, if the injury that may be inflicted is not irreparable, and if there be an adequate legal remedy. The ground upon which equitable intervention proceeds is the inadequacy of the legal remedy; and this is the broad foundation of remedial jurisdiction in equity. The policy of the law is reparation for an injury, while that of equity is prevention; and the latter only supplies the deficiencies of the former in the prevention of trespasses when the law does not furnish a complete remedy. It was held in the leading case of Jerome v. Ross, 7 John. Ch., 315, the opinion being the last one ever delivered by Chancellor Kent, that equity would interfere by injunction in cases of trespass, if the mischief reached to the very substance and value of the estate, and was irreparable in damages, or to prevent a multiplicity of suits. The earlier cases had held more closely to the old rule, that an injunction to prevent an injury to real estate was allowable only in case of waste, or where there was a privity of estate between the parties, and that compensation by way of damages was the only remedy for a trespass.

Equitable intervention as to it was then considered a dangerous novelty; but since the case above cited there has been a gradual change in the inclination of the courts as to equitable interference in matters of trespass; and while the rule laid down in it has been generally followed, yet it has been with a liberal view and a disposition to listen with more favor to an application to restrain a trespass than was the case at that time; and an injunction to do so will now ordinarily be granted if the threatened trespass will destroy the very substance of the estate "in the character in which it has been enjoyed;" or if so permanent and continuous that it can never be said to be complete, so that the injury can be computed; or if the injury can not be estimated in money; or if so vexatiously persisted in that a multiplicity of suits must result; or if committed by one who is insolvent, and against whom a verdict will be valueless.

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The same character of possession of real estate, however, is necessary to maintain an injunction to prevent a trespass to it as to support trespass quare clausum fregit. Unless the plaintiff is in the actual possession at the time of the injury or threatened injury he must fail in either action. This was the rule of the common law, and it prevailed in this State until the passage of the act of the legislature of March 10, 1854, by which the owner of real estate was permitted to sue in trespass, even if he did not have the actual possession at the time of the injury to it. This act was by its title, however, made a part of chapter 50 of the Revised Statutes, entitled "Inclosures and Certain Trespasses;" and when the General Statutes were adopted, containing a chapter with a like title, the provisions of the act supra were not re-enacted; and since they must be considered as containing all the law upon the subjects indicated by the titles, it follows that, with their adoption, the old rule again prevailed.

A patent, when valid, only invests the patentee with legal or constructive seizin; and it is clearly shown by the testimony that the appellant never had any actual possession of the land described in his petition.

It is attempted to avoid this trouble upon the ground that when the timber was severed from the soil it became personalty; that it was then, by legal construction, in the plaintiff's possession; that he then had a right to maintain an action for or to enjoin its removal from the land; and that the prayer of the petition is not only that the appellees be enjoined from cutting and removing timber, but that they be enjoined from removing what they had already cut. Their doing the latter would in itself be but a temporary trespass, for which, in the absence of insolvency, adequate compensation could be had at law; and when not only a remedy, but an adequate one, exists at law, the aid of the chancellor can not be invoked.

There is, however, a prevailing reason why the appellant can not maintain his action upon this ground, and it is also an additional and conclusive one against his doing so for the alleged trespass to the realty.

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The patent to him and upon which he bases his claim of title was issued on July 16, 1846, upon a survey made upon February 13, 1845. It purports to convey to the patentee 4,000 acres.

The survey given and described in it, as shown by the survey and testimony in this case, embraces 9,551 acres; and by way of identifying the 4,000 acres it gives the entire survey, and then says: "Excluding all surveys of record in the above boundary, and likewise one hundred acres belonging to Samuel P. L. Marshall with its appurtenances." This is the only description given in the patent of the land attempted to be patented by it.

It does not even give the names of the excluded surveys. The rule that that is certain which can be made so, certum est quod certum reddi potest, does not aid it, because it contains nothing from which it can be certainly ascertained what land is excluded. The mere statement, "excluding all surveys of record," is too indefinite. It is as uncertain as if it had said "excluding prior grants," since they are of record. In the case of Hamilton v. Fugett, &c., 81 Ky., —, the patent in question was for 74,866 acres, excluding 60,518 acres of prior grants, which were not identified by it, and it was held void.

In the one instance the whole survey was patented, less a certain quantity excluded, but undefined; while in the other 4,000 acres of vacant land is attempted to be conveyed out of a survey of 9,551 acres, without in any way defining or furnishing the means to identify the lands that had been previously surveyed.

The one is as indefinite as the other. The result would be to appropriate vacant lands, without regard to the rights of others, or identifying the lands they might own, and would necessarily lead to much vexatious litigation. If 5,000 acres could thus be taken within the sweeping lines of a survey, equally as well could one-fourth or more of the State. Public policy forbids this; and in the language of the court in Hamil-

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ton v. Fugett, &c., supra: "To sustain this patent would violate the whole purpose and spirit of the statutes regulating the entry and grant of vacant lands."

The appellant never having been actually seized of the land could not maintain an injunction to prevent a trespass upon it even if his patent were valid; but it being void, and he never having been in possession of the timber already cut and not being entitled to it, can not maintain it as to it.

Judgment affirmed.

C. Bennett, W. D. Greer and John K. Hendrick for appellant.

Bush & Trail for appellees.

ADAMS' ADM'R v. L. & N. R. R. CO.

(Filed March 12, 1885.)

1. Negligence, contributory—Railroads—In an action for negligence against a railroad, while the special findings of the jury showed that the road had not used ordinary care, they also showed that plaintiff had failed to use such care. Held—The court properly entered a verdict for the road, although the jury had found for plaintiff.

2. Special verdicts—Character of questions—Upon a special finding the questions put to the jury should not be so numerous as to bring out the evidence in detail, but be limited to such as ascertain the prominent facts in issue.

3. Witness—Re-examination—After a witness has testified in chief it is in the discretion of the trial judge to refuse or to allow a re examination as to the same matter, and he may refuse if satisfied the witness has already told all he knows.

4. Special verdicts are not violative of the ancient right of trial by jury.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor.

In the case of Witty v. The Railroad Co., 6 Ky. Law Rep., 321, it was held that where the jury is directed to find a special verdict the court may, but is not compelled to, direct them to find a general verdict, and it was further held that the failure to instruct the jury as to what was ordinary, and what willful or gross neglect, was not error, because when the facts were found by the jury it was a question of law for the court. Sub-

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section 5 of section 317: That when a special verdict is required the questions of law may be reserved by the court until after verdict. So in this case there was no error committed in refusing the instructions applicable to a general verdict or in refusing to require such a verdict to be rendered.

The principal objection to the proceedings in this case arises from the number of questions or interrogatories propounded to the jury by both parties. The answers to special interrogatories were designed to lead to the finding of certain prominent facts, that must determine the law of the case either for the plaintiff or the defendant. There has been a departure in this case from this rule on both sides, the plaintiff propounding some sixteen interrogatories and the defendant about twice that number. Twelve men were sworn as jurors, and after hearing the testimony were required to give in substance the statement of each witness. They were examined and cross-examined as to the entire testimony, and the mode of interrogation could not have extended further if the jury as a body had been required to depose on oath as to the substance of all the testimony given. Such a practice not only encumbers the record, but confuses the minds of both the court and jury, and leaves all parties at sea as to the issue of fact to be tried. There was only one issue in this case, and that was, did the intestate lose his life by the willful negligence of the company or its employes; if so, in what did that negligence consist? It is the controlling fact or facts that should be ascertained by the special findings, and not the testimony establishing those facts. It may have been a dark night, and the intestate may have eaten his supper at Louisville before the train left, and while such questions were proper to ask a witness, they were not such facts as should have been made the subject of a special finding. Both parties, however, having seen proper to interrogate the jury in that manner, the response of the jury to the questions propounded by the defendant may be disregarded, and still the response to the plaintiff's interrogatories shows that no recov-

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ery could be had. The intestate had left Louisville for his home at or near Elizabethtown about 10 o'clock at night on a long train of passenger cars that were carrying those who had attended some celebration at Louisville, bound to their homes. The ordinary train was not sufficient to hold them, and passenger cars were attached to a sleeper that seems to have occupied about the middle of the train. The intestate was in a car behind the sleeper, and next to it. When reaching the depot at Colesburg, it is alleged that the train having stopped at the depot, and that fact being announced, the car in which the intestate was seated, by reason of the length of the train, stood over a small creek, and the intestate getting out of the train to go forward for the purpose of getting something to eat, fell through the trestle on stones in the bed of the creek, and was so badly injured that he died the next day. It was a very dark night, and the intestate was no doubt in ignorance of the danger when he left the car. Two young men in the car with him followed him out, but did not see him fall, although one of them fell shortly after the intestate did, but received no injury. The jury said by their special finding for the plaintiff, first, that when the train stopped at Colesburg the employes called out the station. They further said that where the intestate got off it was not a safe place to land passengers.

In answer to a question as to whether, after getting off the car, the intestate fell from the bridge or trestle, the jury responded that they believed the train was slowing up when he got off. They further said that the intestate failed to use ordinary care, and that the employes of the company or the company were guilty of a want of ordinary care in leaving the sleeper between the ordinary passenger cars. When asked if the plaintiff ought to recover, what amount should she receive, they responded by saying we believe the plaintiff should recover $1,250.

The special finding by the jury was to the effect that the train was moving to the depot slowly at the time the intestate got off the train, and that the latter was himself in fault, while

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the only neglect on the part of the company consisted in its having a sleeper midway between the ordinary passenger cars. On such special findings the court must necessarily have rendered a judgment for the defendant. The evidence on the part of the plaintiff also conduces to sustain this view of the case.

The witness, Chelf, who left the car at the time of the accident, following the deceased, was submitted to an examination in chief as well as to a rigid cross-examination, and his testimony tended to show that the car must have been moving when the intestate, who preceded him, got off. The counsel for the plaintiff, after the cross-examination had ended, desired to examine his witness with reference to the same matter and to explain his statements made on the cross-examination. The court refused this privilege upon the ground, no doubt, that as to time, place and other circumstances connected with the occurrence, the witness had made full and complete statements. The witness was before the court, and from his statements, conduct, etc., the court may have been satisfied that he had disclosed to the jury fully all he knew in regard to the death of the intestate. We can not say that it was an abuse of discretion, and particularly when looking to the affidavit of Chelf filed on the motion for a new trial. In this affidavit the witness states that he saw intestate after he got off the car, and he knows the car stopped, or about stopped, when Adams got off.

This still leaves the matter in doubt, and particularly when Chelf walked along safely to the front of the train and Adams fell through the trestle. The evidence of the defense conduces also to show this same state of case. While it is not necessary to determine the liability of the company in failing to have a secure and safe place of egress from any of its cars whenever it may stop at a depot, we are satisfied from the proof that the cars were in motion when the appellant's intestate attempted to leave them, and that his sad misfortune resulted from his own neglect. It is proven that the name of the station was

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called out, and this is always or usually done before reaching the depot, and those on the rear of the train, in their anxiety to leave for something to eat, undertook to get off before the train stopped. The jury has so said and the verdict is sustained by the testimony, so without looking to the special verdicts returned for the defendant, the law of the case is against the plaintiff upon the findings to her own interrogatories.

It is claimed that these special findings are in violation of the ancient mode of trial by jury. This question is made for the first time, and after repeated adjudications by this court in reference to special verdicts. It is the province of the court to pronounce the law and the jury to pass on this issue of fact, and whether the law is given before or after the finding of the facts by the jury is immaterial.

When the evidence offered is not of the character that will support the plaintiff's claim on the issue made, a demurrer to the evidence was the practice at common law, and this applied when there was no special finding authorized, but Mr. Stephen says "a more common, because more convenient, course than this to determine the legal effect of the evidence is to obtain from the jury a special verdict, instead of finding the negative or affirmative of the issue, as in a general verdict. The jury at common law ascertained all the facts disclosed by the evidence, and then left the court to say whether the law authorized a verdict for or against the plaintiff" (Stephen on Pleading, page 123). The jury gave their opinion as to the existence or nonexistence of the fact or facts involved in the issue, and then a verdict was entered, says Mr. Stephen, without their interference. While the jury has said that the plaintiff ought to recover $1,250, it is certain that the response was obtained by the character of interrogatories propounded by the plaintiff. "If the plaintiff ought to recover, what amount or sum is she entitled to?" There could have been no mistake as to the finding, and if there was the court ought not to have ascertained it from the jury. The special interrogatories were all

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answered, and in such a manner as determined the case for the defendant. The court properly overruled the motion for a new trial, nothing occurring during the progress of the trial or after that entitled the plaintiff to be again heard.

Judgment affirmed.

J. P. Hobson for appellant.

Wm. Lindsay for appellee.

BURCH'S HEIRS, &c. v. BURCH'S HEIRS, &c.

(Filed March 31, 1885.)

Co-tenancies—Lien for rents—A joint tenant or tenant in common is not entitled to a lien upon the share of his co-tenant for rents collected by the latter before partition.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Lewis.

In 1855 the heirs at law of Leonard Burch, deceased, recovered judgment for a tract of land containing about 700 acres. And in 1858 one of the heirs instituted an action against Thomas B. Burch, administrator, and also an heir, for a settlement of the estate and partition of the land between the seven heirs, it being stated in the petition that he had fraudulently conveyed it to one Carrico, who was made a defendant to the action.

Three other actions for the same purpose were subsequently commenced. But in 1865 they were all consolidated and thereafter tried together, though it was not until 1879 that a judgment for partition was rendered.

In defense of the actions Thomas B. Burch, before his death in 1863, and his heirs afterwards, denied the right of the other heirs of Leonard Burch to any part of the land, contending that it was not more than sufficient to compensate him as administrator, and for the extraordinary labor and expense incurred by him in maintaining the protracted litigation begun in 1841 to recover the land, and also contended that he was the rightful owner by purchase of four-sevenths of it.

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By the deed made in 1860 Thomas B. Burch conveyed to Carrico absolutely four-sevenths of the land, and the latter took possession of the whole of it, and occupied and used it several years. But an agreement in writing was at the same time entered into between them that the land conveyed was to be held by Carrico, subject to the conditions and for the purposes therein recited. And sometime after his death the heirs of Thomas B. Burch took possession, claimed and held different parcels of the land.

By the judgment rendered in 1879 three of the heirs of Leonard Burch were entitled each to one-seventh of the land, and commissioners were appointed to divide it accordingly, and the master commissioner was directed to ascertain and report the value of rents and improvements. And in 1881 a judgment was rendered in favor of appellees against the estate of Thomas B. Burch, his heirs at law, and Carrico for three-sevenths, the value of rents and profits as found and reported by the master due by them respectively, after deducting the value of improvements. And also adjudged that appellees have a lien upon all the land, except the parcels allotted to them to satisfy the amount due for rents and profits.

There is no appeal from the judgment of 1879, nor is any other objection made to the one rendered in 1881, except so much of it as determines the existence of a lien on that part of the land belonging to the heirs of Thomas B. Burch, and directs a sale of it to pay the value of rents and profits found due. And whether such lien exists is the only question presented on this appeal.

We have not been referred by counsel to any authority, nor have we been able to find any recognizing the existence of a lien in favor of one tenant in common or joint tenant upon the interest of his co-tenant for the payment of the value of rents and profits received by the latter before partition of the land.

It has been held by this court that a tenant in common purchasing a conflicting claim to land which enures to the benefit of his co-tenant, has an equitable lien for a due proportion of

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the price so paid by him. (Venable, &c. v. Beauchamp, 8 Dana, 321.)

It has also been held that there may in certain cases exist a lien on the estate for repairs and improvements done by one joint owner. (Alexander v. Ellison, &c., 79 Ky., 148.)

But it never has been held by this court that rents and profits received by one joint owner previous to partition of the land constitute anything more than a personal charge against him.

The lien in favor of one joint owner of land, whenever recognized to exist at all, is founded upon the doctrine of contribution in equity, and the only reason for enforcing it for improvements arises from the necessity for the preservation of the estate, or the benefit to the joint owners by an enhancement of its value.

But there is no reason why there shoud be a charge or encumbrance upon the interest of one joint owner, either before or after partition, to satisfy a claim of his co-tenant for rents and profits received. The right to partition exists and may be enforced, and pending the action therefor the chancellor may amply protect the rights of each joint owner by placing the estate in the hands of a receiver, or by other proper provisional remedy. But it is not the policy of the law to enforce liens upon the interest of one joint owner of land in favor of another for unadjusted, and to innocent purchasers and creditors often unknown, accounts for rents and profits.

There does not appear any reason why judgment for a division of the land in this case was so long delayed, nor were there any steps taken by appellees, as might have been done, to secure their just share of the rents and profits. In our opinion the only remedy they were entitled to when the case was finally disposed of was personal judgment for the amount of rents and profits due them, enforceable at law. And the court erred in adjudging a lien existed and a sale of the interests of appellants in the land to satisfy the amount due. The judgment is,

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therefore, reversed and cause remanded for further proceedings consistent with this opinion.

Lewis & Fairleigh for appellants.

A. Duvall for appellees.

JONES' ADM'R v. L. & N. R. R. Co.

(Filed March 28, 1885.)

Railroads—Willful neglect—Contributory negligence—In an action against a railroad for willful negligence it is no defense to show contributory negligence on the part of the person injured unless it appears that the injury really resulted from such contributory negligence, and not from the willful neglect of the road.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Lewis.

Appellant states in his petition that his intestate was at the time of his death employed in the service of appellee as a brakeman on its railroad train, composed of baggage, passenger and freight cars, and while actively engaged in the performance of his duties as such, in seeing that the rear cars were coupled and attached, was killed by being thrown by the train against a bridge, over which it was running at an unusual rate of speed, which killing was occasioned by the willful neglect of appellee, its agents and servants.

The first paragraph of the answer contains simply a traverse of the material allegations of the petition. But in the second it is stated the deceased negligently placed his body outside the car on which he was riding just before it entered the bridge mentioned, the location of which he well knew, whereby it came in contact with the bridge, and he was knocked from the train, and his head and shoulders injured so that he died therefrom, and that his death was wholly caused by his own neglect.

A general demurrer to the second paragraph was filed and a motion made also to strike it from the answer, but both were overruled, and this action of the court is made ground for reversal.

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Under the Civil Code, section 118, an answer may contain as many matters of estoppel and of avoidance, legal or equitable, total or partial, and may make as many traverses as there may be grounds for in behalf of the pleader. And if there be more than one, each must be stated in a separate, numbered paragraph.

In the second paragraph of the answer is stated the manner in which the deceased lost his life, which is essentially different from that described in the petition, and that the injury was caused wholly by his own neglect. And if the matter thus relied on is sufficient at all as a defense or in avoidance of the action, he had right to plead it in a separate paragraph.

Though it has been repeatedly held by this court, and may be considered settled, that contributory neglect on the part of the deceased will not relieve a party from responsibility under section 8, chapter 57, General Statutes, by whose willful neglect his life has been destroyed, nevertheless if it be true, as stated in the second paragraph of the answer, that the injury received by the deceased was caused wholly by his own negligence, it necessarily results that his life was not lost or destroyed by the willful neglect of appellee or his agents and servants, and this action can not be maintained. But whether the circumstances under which the injury was received, as stated in the answer, are sufficient to relieve appellee from legal responsibility, of course depends upon the facts of the whole case. And this brings us to the consideration of the next error assigned, which is on account of the action of the court in giving, at the close of the evidence offered by appellant, a peremptory instruction to the jury to find for appellee.

The train on which the deceased was employed when it left Anchorage station was composed of fourteen or fifteen freight cars and a passenger and baggage car, the two latter being at the rear end. But when it reached Scott's station, for some reason not explained, the position of the cars was so changed that eight or nine of the freight cars were put in front and five or six of them in rear of the passenger and baggage cars. And

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this change made it necessary for the deceased, who acted as middle brakeman, to occupy as his position the baggage car instead of on top of one of the freight cars where he had previously been.

The only witness who saw the deceased at the time he received the injury from which he died was a fellow brakeman, whose position was on top of one of the freight cars, nearer the engine than the baggage car, and who was at the time looking towards the rear end of the train in order to discover and give warning of it in case the rear cars became uncoupled. He testified that he saw the deceased either at the door or on the steps at the end of the baggage car when it was a car length or more from the bridge, looking back towards the rear end of the train, his head and part of one shoulder being out, and saw him strike against the bridge, whereby his head and left shoulder were so much injured that he died very soon after.

According to the uncontradicted testimony of that witness it is manifest that the life of the deceased was destroyed by his own act in placing his body, while the train was moving, so far beyond the side of the baggage car as to bring it in contact with the bridge, which was about two feet wider than the cars.

The evidence shows omissions of duty and violation of necessary and prescribed rules for operating railway trains by those in charge at the time the deceased was killed.

But in order to authorize a recovery in this case not only must willful negligence, in the meaning of the statute, on the part of those in charge of the train be shown, but it must appear that such neglect was the proximate cause of the injury to the deceased, or that such injury would, under the circumstances existing, be the natural, probable or ordinary result of such neglect.

The evidence establishes the following facts which show negligence on the part of those having control of the train when the deceased was injured: In running what is called a mixed train it is safer for both passengers and employes that the passenger and baggage cars should be in the rear of the

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freight cars, yet no satisfactory reason is given for the position the cars occupied when the deceased was injured. One of the rules of the company requires a red flag kept on the hindmost car to enable the engineer himself to see it in case the rear cars became uncoupled. But it was not done by those in charge of that train, and the duty was consequently imposed on the brakeman to watch the rear cars. And as they had become uncoupled as many as two times before reaching the bridge, where the deceased was injured, there was a necessity for increased vigilance on their part. It also appears that the train was running at a greater rate of speed when it crossed the bridge than the prescribed rules of the company authorized, and that, although the proper signal was whistled, the bell was not rung as the train approached the bridge.

It is not necessary to determine whether those in charge of the train were or not guilty of willful neglect unless it be made to appear that the injury to the deceased was either the immediate and direct result of such negligence, or else that the act of the deceased was such as it was the legal duty of those in charge of the train to have foreseen and provided against.

The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, although those consequences be immediately and directly brought about by the intervening agency of others, provided their acts, causing the damage, were the necessary or legal and natural consequences of the original wrongful act (Addison on Torts, 7). And in this case appellee would be answerable for the injury to the deceased, notwithstanding it was immediately and directly brought about by his own act, if that act had been the necessary, legal or natural consequence of the neglect on the part of those in charge of the train, or if the act of the deceased, according to the ordinary course of events, had been the usual or probable sequence of the neglect. But those in charge of the train could not be required to foresee and provide against the extraordinary and reckless act of the deceased. For the evi-

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dence shows that he had been employed as brakeman on that railroad long enough to become fully acquainted with the nature of his hazardous business, and of the location and condition of the bridge. It may be assumed that he was at the time he received the injury in the performance of what he conceived to be his duty, and that he placed his body in the position it was when the injury was received for the purpose of ascertaining whether the cars were coupled; still there was no necessity, nor was he required at that time, to recklessly expose himself to the injury he received, for there was another brakeman on top of the freight car who was performing the same service, and, besides, the deceased could and should have awaited the crossing of the bridge before exposing himself. Nor can the act of the deceased and consequent injury be directly and immediately attributed to either the failure to ring the bell or the increased rate of speed of the train, for it is clear that the ringing of the bell would not have been more apt to attract his attention than the whistle of the engine, and that the injury would have occurred even if the train had been running at the usual rate of speed.

It is probable that if the position of the cars had not been changed at Scott's station the deceased would, when the train crossed the bridge, have been on top of a freight car, and consequently not injured by placing his body where it would inevitably come in contact with the bridge. But even conceding that those in charge of the train were guilty of negligence in changing the position of the cars, the injury to the deceased was not the proximate, probable or natural result of the change.

In this case the deceased, with a knowledge of the risks and dangers incident to his employment, and familiar with the peculiar danger of exposing his person at the time and place he did do, himself caused the destruction of his life, and did it in a manner and under circumstances that could not have, with reasonable diligence on the part of those controlling the train, been foreseen and provided against. In our opinion, therefore, it is clear from the evidence that the life of the de-

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ceased was not in legal contemplation lost or destroyed by the willful neglect of appellee's agents and servants, and the peremptory instruction was properly given.

Judgment affirmed.

J. W. Head and A. Duvall for appellant.

H. W. Bruce, Bullock & Beckham and Wm. Lindsay for appellee.

FLANAGAN, &c. v. SHUCK, &c.

(Filed March 28, 1885.)

Partnership property—Co-partners' lien—Where a firm of lawyers took a tract of land in payment of a fee and held it in their joint names, Held—An individual creditor of one of them could not subject the land until the co-partner had first been paid what was due him on a settlement of the partnership accounts.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The appellants as judgment creditors of Finley Shuck are seeking to subject to the payment of their debts his alleged undivided interest in a tract of land purchased by "Belden & Shuck" as partners in the practice of the law. This is resisted by Belden upon the ground that it is partnership property, and that upon a settlement of the partnership Shuck will owe him more than the value of the land.

The appellants at the threshold say that the lower court should not have decided adversely to them because the appellee, Belden, did not by an appropriate pleading bring Shuck before the court, and manifest his claim; and thta if this had been attempted it would perhaps have appeared that nothing was was owing to Belden, or if the contrary were shown, then that there were assets of the firm, aside from the land, sufficient to satisfy any such indebtedness.

The appellants, however, did not ask that any such settlement be made; and it is an admitted fact that upon a settlement of the firm matters Shuck would owe Belden more than the value of the land.

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There was no necessity for an investigation to ascertain what upon the pleading was an already admitted fact; and the allegation that upon a settlement of the partnership a certain sum would be owing, necessarily involved the idea of a consideration of all the firm assets.

It is admitted by the pleadings and the agreed statement of facts that the land was purchased with partnership assets, and that the object of the purchase was to secure a fee owing to the firm; that "Belden & Shuck" have held it as partners ever since their purchase, and that it is their partnership property; that their firm matters have never been settled, and that when this is done there will be due Belden by Shuck over $500, and that the land is only worth from $300 to $400.

It is urged that the only business of the firm was the practice of the law; and that, therefore, the land could not be used in or appropriated to the firm business, and hence can not be treated as personal property, and held to be firm assets.

This presents what has been termed in some of the adjudged cases "a distressingly vexed question," and one as to which the authorities are quite conflicting. Some of them hold that real estate, in order to be treated as personalty, even as to the partners inter se and the firm and its creditors, must be purchased for strictly partnership uses and so appropriated; while others hold that it is sufficient if it be purchased with partnership funds.

It is unnecessary to review the numerous cases. To do so we would have to begin with the opinions of Lord Thurlow upon one side and those of Lord Eldon upon the other; and we shall content ourselves with saying that we think the true principle, deducible from all of them, is that if real property has been purchased with the firm means, and is held in the joint names of the partners as partnership property, then, in the absence of any agreement between them to the contrary, it should be regarded at law as held and owned by them as tenants in common; but that in equity it should be treated as held by them in trust for the firm, subject to the rules ap-

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plicable to partnership personal property, and liable to the debts of the firm, and the claims of each partner upon the others; and after these claims are satisfied the residue of it, if any be left, will belong both at law and in equity to the partners as tenants in common unless they have by an agreement, either express or implied, impressed upon it the character of personal property for all purposes.

It is really a question of intention upon the part of the partners, to be gathered from all the attending circumstances, without regard to whether the title is vested in one of the partners for the firm or all of them.

It must be assumed in all cases, unless a contrary intention be shown, that the partners intended that the partnership real estate should be treated as partnership assets, and, therefore, as personalty, so far as it may be necessary to pay the partnership debts and the claims of the partners inter se; while the modern rule is that in order to convert it into personalty for purposes beyond these, or for all, there must be an agreement, either express or implied, to do so.

In this case no question of distribution between heirs, widow and personal representative arises; it is purely one as to how the real estate shall be treated for partnership purposes. There is nothing shown by the record to rebut the presumption that the partners expected and intended that the land should be treated as partnership assets as to partnership purposes.

There was no charge made upon the firm books as against either of them, so far as is shown by the record, of any amount as invested in the land, or drawn out of the firm business; and it is admitted that it was purchased with the fees or means of the firm and held as partnership assets. Under such circumstances an honest purpose requires that the investment, which was made for the benefit of the firm, shall be applied to the payment of the partnership liabilities, if needed; and the principle of justice involved should not be sacrificed to a technical rule, which may be regarded indeed as no longer existing. Each partner is liable for all the debts of the firm; and he is

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properly, therefore, entitled to an equitable lien on all its property, whether it be real or personal, for indemnity and re-imbursement; and for this purpose while the eye of a court of law can see only the legal title of real estate, yet a court of equity will treat it as personalty and firm assets, as to the payment of the firm debts and the adjustment of the partnership rights. This is now the English rule, and it is supported by such eminent legal writers as Kent, Story, Washburn and Collyer, and is founded upon sound policy and obvious justice. If the appellants could in this instance subject the alleged interest of Shuck in the land to their claims, it would be taking from the other partner what upon admitted facts equitably belongs to him.

Tested by the rules above laid down we do not think the lower court erred in holding that the property in contest could not be subjected to the claims of the appellants, and the judgment is affirmed.

Hill & Rives for appellants.

J. D. Belden for appellees.

HENDERSON, &c. v. DUPREE, &c.

(Filed March 21, 1885.)

1. Adverse possession—Bond for title—One who takes possession of land under bond for title does not hold adversely to his obligor until a deed is made for the land or he openly repudiates his obligor's title.

2. Appeal—Motion for new trial—Where the court tries both law and facts in an ordinary action, but no motion for new trial is made, error in excluding or admitting evidence can not be considered on appeal. But whether there is any evidence at all to sustain the judgment may be considered. Upon this question see further 4 Ky. Law Rep., 885, and cases there cited.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Holt.

The primary object of this action was the division of a tract of land among its joint owners. By a judgment the appellants were charged as a part of their portion with 191 acres, then in

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the possession of Anna Dupree, and which she claims was sold by them, by one Taylor as their agent, to one Wayne by title bond in 1849, and then by him to one Boyd, and by him to one Todd, and by him to her. The appellants then made her a defendant by an amended petition, in which they seek to recover the land from her, and upon which a summons was issued against her on November 23, 1882. Todd having conveyed the land to her with general warranty of title, he was allowed to appear and contest by answer the right of the appellants to it. He did so upon two grounds, first, adverse possession; and, second, champerty, the last defense being based upon the fact that the appellant, Malinda Henderson, had obtained conveyances to herself from her co-heirs of their interests in the land, when (as is claimed) it was held adversely.

In this way this equitable action was converted into one of ejectment, but was never transferred to the ordinary docket. By agreement, however, an order was entered for its trial by a jury, and a day fixed therefor; and it not being then tried, another day was then named by another order; and finally it was by consent submitted to the court, and a jury waived. The action was dismissed as to Anna Dupree; and without being asked to do so the court in its judgment separated the facts found from the conclusions of law, and the appellants entered a general exception to it. No grounds were filed or motion made for a new trial within three judicial days after the rendition of the judgment. The issue was a purely legal one; and by the orders of the court was made one out of chancery, triable by a jury, unless the parties waived it; and the same rules must, therefore, govern as in case of the trial of an ordinary action by the court without the intervention of a jury.

We are aware that a review of the decisions of this court show some conflict as to the necessity of a motion for a new trial in such a case, and we are asked to overrule the case of Helm v. Coffey, 80 Ky., 176 (3 Ky. Law Rep., 677).

Ordinarily the facts are found by a jury, while the court decides the questions of law; and only the latter are subject to

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exception. In such a case a party must except when the decisions are made, and must, within the proper time, enter a motion for a new trial, based upon written grounds, in which the attention of the court must be specifically called to the alleged error. We see no reason why this should not be required in cases where both the usual province of the jury and that of the court are committed to the latter, because the theory of appeals in such cases forbids one until the lower court has been afforded an opportunity to correct its error upon its being specifically pointed out, thus often avoiding the expense and trouble of an appeal, and enabling this court, when taken, the better to ascertain what error has been committed and excepted to below.

The rule as announced in Helm v. Coffey, supra, is now understood to be the rule of practice in this State; and it is of more importance that it should be uniform and stable than that it should be the best possible one; but we adhere to it as announced in that case because we regard it as the proper and safe one.

In this instance, the appellants having failed to move for a new trial within the time fixed by law, the numerous alleged errors, as to the admission of testimony and otherwise, can not be considered. The testimony, in our opinion, supports the judgment, while the answer certainly presented a defense; and as there was no motion for a new trial no other inquiry is involved.

Thus, even admitting that the second paragraph of the reply did not fully make an issue and contain in substance all that was stated in its first, third and fourth paragraphs (as in our opinion it did), yet for the reason above stated it could not now avail the appellants. In the absence of a motion for a new trial this court will not consider the evidence in the case as it would if it had been made; yet it is proper to determine whether there is any testimony whatever to support the verdict or judgment, because if none, then only a question of law was presented to the judge of the lower court, and a party ought

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not to be required to call his attention to the fact that the adverse party has no case or defense whatever. For this reason it has been held that it is unnecessary to assign as a ground for a new trial a peremptory instruction to the jury in order to raise the question upon an appeal. If a party presents no reason whatever in his pleadings or by testimony against the claim of his adversary, a rule requiring the attention of the lower court to be called to it would be purely technical, without reason, and founded only upon the presumed utter incompetency of the judge. If, notwithstanding the evidence, it would have been proper in him to have instructed peremptorily against the party that has succeeded, or in effect have sustained a demurrer to the evidence, then only a question of law was presented which, upon a consideration of the whole case, was decisive of the party's right, and ought to be considered by the appellate tribunal even in the absence of a motion for a new trial.

A purchaser by title bond or executory contract, although a quasi tenant, or even a tenant, may, by disclaiming the relation and by notoriously claiming to hold adversely to his contract, or by actual notice to the landlord or vendor to that effect, hold adversely in fact; but admitting that so long as the parties looked to the appellants for the legal title by reason of the title bond given to Wayne in 1849, and while the contract was executory, that their possession was amicable, yet in 1860 Taylor, as the agent of the appellants, conveyed the land to Wayne by deed, and the latter to Boyd, and he to Todd, and he to Mrs. Dupree. The deeds were recorded in the proper office; they called for a marked boundary and described the land by metes and bounds and courses and distances.

It is urged, however, that Taylor had no authority to sell the land in 1849 or to convey it in 1860, and none is shown, but yet the appellants, without seeming consistency, rely upon the fact that from 1849 to 1860 Mrs. Dupree, or those through whom she claims title, looked to the appellants for it, and that,

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therefore, possession was not adverse; and further say that the deeds made in 1860, being void for want of authority in Taylor as agent, could not create an adverse holding or a possession beneficial to the appellee. If the deeds were valid, then no question of adverse possession would arise, because they would have passed the title; and admitting that up to the time they were made the party in possession was their quasi tenant, and that his possession was not, therefore, adverse, yet one who so enters at the outset may show a subsequent adverse possession in himself; and if he was such under an executory contract of purchase, then whenever a deed is made to him his possession becomes adverse instead of amicable, although the deed may be void and pass no title, provided he then ceases to look to the vendor for title, and claims the land as his own.

The question depends upon how he in fact claims and holds; and if he regards the contract as executed, and no longer looks to the vendor for title, but claims in his own right, then his possession becomes adverse as to all the world.

No question arises in this case under the thirty years' limitation statute contained in section 4, article 1, chapter 71 of the General Statutes; but it can not be presumed in this instance that after the making of the deeds in 1860 that the grantees in them still regarded the alleged contract of purchase as executory, and that they did not, from that time at least, claim and hold adversely.

The testimony clearly shows otherwise. The land had been surveyed to Wayne; it was held by him from the outset under a marked boundary, and the purchasers improved it greatly by clearing and building houses upon it, and otherwise adding largely to its value. Their numerous acts showing that they were holding adversely to every one were open and notorious. From the time the deeds were made until a summons was issued against Anna Dupree on November 23, 1883, nearly twenty-three years elapsed; and even if the entire period during which the late war existed be deducted, owing to the plaintiffs having then been residents of the Confederate States, and also a reasonable time within which the plaintiffs ought, under all the

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circumstances, to have learned of the adverse holding, yet there still remains over fifteen years, during which the land was held adversely.

This fact renders it unnecessary to discuss the question of champerty; and it is sufficient to say as to it that all the parties claimed through the same title, and that a possession may toll the right of entry, and be adverse under the limitation act while it is not so under the law against champerty.

Judgment affirmed.

W. G. Bullitt and J. D. Wilds for appellants.

Nichols & Hawes for appellees.

DODGE'S ADM'R v. MOSS, &c.

(Filed October 25, 1884.)

Contract, right of stranger to sue on—Lien—Where A sells land to B in consideration that he will pay A's debts, A can not, after the creditors have accepted, release B from liability on the promise. The creditors have a lien on the land, and one may sue on the promise without joining the other creditors.

Appeal from Hickman Court of Common Pleas.

Opinion of the court by Judge Lewis.

In 1858 Edward Crossland was the owner of a tract of 530 acres of land devised to him by his father, and to secure the payment of a debt for the nominal amount of about $3,400 he executed a mortgage upon it to one L. M. Lee, who instituted an action against Crossland to enforce his lien and subject the land to the payment of his debt. Pending that action appellees, who each had recovered judgment against Crossland, by the advice of appellant Bullock, who was their attorney, caused execution to issue and be levied upon Crossland's equity of redemption in the land, and at the sale thereof Bullock purchased it as attorney for the sum of $2,000. Though the return of the officer who levied and sold shows that Bullock purchased as attorney, he in his own name filed a petition to be made a party to the action of Lee v. Crossland, and, being so made, set up the indebtedness on account of his bid of $2,000, and

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also controverted Lee's right to secure the whole amount claimed by him, and upon final hearing it was adjudged that he was entitled to recover against Crossland only about $2,400, instead of $3,400, the amount sued for. By that judgment the land was directed to be sold to satisfy, first, the debt of Lee; second, the $2,000 bid by Bullock for the equity of redemption, and interest at 10 per cent. from April, 1868, until paid; third, a debt of one Herriford; fourth and fifth, debts of Smealey and Proctor for about $500 each, which J. R. Dodge, deceased, subsequently became the owner of.

On the day the land was sold by the commissioner of court, and as we think is shown by the preponderance of the evidence, before the sale took place a written contract was entered into between Crossland of the one part, and Walker, Bullock and Dodge of the other, by which it was agreed that he, Crossland, would procure his wife's relinquishment of dower in the land, and convey it to Walker, if he, Walker, would pay off the debt mentioned in the judgment before referred to, and others he was owing. It was, however, understood that Walker, with a view to get as long indulgence as possible, was to bid for the land when offered for sale by the commissioner, and he did bid it in at about $3,600, and was reported to court as the purchaser. Crossland afterwards conveyed the land to Walker for the expressed consideration of $6,000, his wife uniting with him in the deed. We think the evidence satisfactorily shows that both Dodge and Bullock were parties to this contract, and were under it entitled to an undivided third of the land and bound, as between them and Walker, to pay one-third of the debts of Crossland, which amounted to about $6,000.

The written contract is not filed, and appears to have been lost or mislaid by Crossland. But he proves the contents of it, and his statement is not controverted by Bullock, nor the personal representatives of Dodge and Walker, who are parties to the action.

This action was instituted January, 1867, by Moss and others, the clients of Bullock, and creditors mentioned in the

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judgment rendered in the action of Lee v. Crossland, to recover personal judgment for the sum of $2,000, with interest at the rate of 10 per cent., against Bullock, and the personal representatives of Walker and Dodge, and to enforce their alleged lien upon the land purchased by Walker, and also conveyed to him by Crossland and wife.

It will be perceived that all the creditors whose debts were provided for in the contract between Crossland and Walker, Bullock and Dodge, do not unite as plaintiffs in this action, nor have they sought to recover under that contract.

But the failure of the other creditors to sue need not prejudice the rights of Moss and others, for whom the equity of redemption was purchased by Bullock, nor prevent them from recovering if they have any right of action founded upon the written agreement made by Walker, Bullock and Dodge with Crossland in 1859. And whether they have such right of action is the main question in this case.

That a party for whose benefit a promise is made to another person may maintain an action upon such promise against the party who has made it, though not made to the plaintiff, is a proposition too well settled by this court to require a citation of cases to support it.

But it appears that in 1864 Crossland, for the consideration of about $200, in writing signed and delivered to Walker, agreed to cancel and annul the contract entered into between himself and Walker, Bullock and Dodge in 1859.

From Crossland's deposition it appears that at the time the release was executed he was a soldier in the Confederate army, not in a position to know whether the representations made to him by Walker, and which he states induced him to execute the release, were true or not. These representations to him were that all the debts provided for in the contract, except one due to Herriford, had been paid by him, Walker, Bullock and Dodge.

As the representations were not true, clearly even Crossland can not be bound by the release if they should be pleaded in

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avoidance. But the plaintiffs in the action do not in their pleadings rely upon fraud or anything else in avoidance of that release, but it is left to have its full legal effect. Consequently the question arises whether Crossland had the right in 1864 to annul the contract made in 1859, for the benefit of his creditors, so as to deprive them of their right of action upon it. It seems to be conceded that if they had accepted the contract of 1859 Crossland would not thereafter have had the power to annul it, but it is contended that they had never in any way accepted or assented to it, and, therefore, the release executed by Crossland in 1864 operated to deprive them of every right under it. This position is in accordance with the doctrine announced by this court in the case of Jones v. Higgins, 4 Ky. Law Rep., 390, and we see no reason to now depart from or dissent from its correctness. But can it be assumed that the creditors of Crossland, or those who were the clients of Bullock, had not accepted the contract of 1859?

We are of the opinion it can not, but on the contrary they did accept it.

It is admitted by Bullock that his object in becoming a party to that contract was to save the amount, $2,000, bid by him for Crossland's equity of redemption, and that amount he expected to be considered by Walker and Dodge as a payment of his one-third of the $6,000, the consideration expressed in the deed from Crossland to Walker as the purchase price of the land. Bullock did not owe the debt of $2,000, but it belonged to his clients. He was not attempting by the arrangement to save a debt of his own, but theirs. He did not sustain the relation of creditor towards Crossland, but his clients did. Being a party to the written agreement made for the benefit of his clients, and in their interest, his act must be regarded as theirs, and equivalent to an acceptance by them of the contract between Crossland, Walker, Dodge and him. The circumstances of this case make it too plain to doubt that what Bullock did was in the interest of and for his clients, and that Crossland, Walker and Dodge were well aware of the attitude

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Bullock occupied, and of the object he had in uniting in the contract now sought to be enforced. The plaintiffs in this action having thus practically and to every legal intent accepted that contract, Crossland had no right in 1864 to release the parties to it, and consequently appellees were entitled to the judgment rendered, which appears to be the sum of $2,000 and interest counted thereon from 1859.

It follows necessarily that if appellees under that contract have the right of recovery, they also have a lien on the land to secure the payment of their debt.

It was suggested before the judgment was rendered that there was a defect in the title to a portion of the land arising from a mistake made in the will of Samuel Crossland, and also in the deed of Edward Crossland, in describing it. But this action had been pending from 1867, and the plaintiff in the action should not have been required to longer continue the case, and we are not disposed to reverse the judgment for the alleged error of the lower court in refusing to longer continue it.

Appellant Dodge, administrator of J. R. Dodge, complains because the court refused to render judgment at the same time adjusting and settling the rights of himself, Bullock and Walker. But this question does affect appellees. And moreover a judgment has since been rendered in the case of Lee's Adm'r v. Walker's Adm'r, consolidated with this action, ascertaining and determining the rights of the parties to the contract of 1859.

The judgment is affirmed.

Wm. Lindsay for appellant.

W. G. Ray for appellee.

RASH v. HOLLOWAY.

(Filed March 19, 1885.)

Statutory construction—Constitutional law—Peddler's license—A State statute requiring a license of all peddlers being amended so as to exempt citizens of this State, it is held this is a discrimination against citizens of the other States and is, therefore, unconstitutional, but the original act is not for that reason void, and the license abolished as to all citizens. 2. An

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act being in terms amendatory of another can not be held to repeal the original act except by implication, and the law does not favor repeals by implication. (For opinion of Superior Court, here reversed, see 6 Ky. Law Rep., 349.)

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Hines.

This action was instituted on a note executed for the purchase price of lightning rods manufactured in the State of Illinois and sold by a citizen of that State to a citizen of this State. The defense is that the contract is void, being so declared by the statute, when, as in this case, the person selling is a peddler without license. The court below held the contract void and dismissed the petition, and from that judgment this appeal is taken.

Section 1 of chapter 84 of General Statutes provides that "all itinerant persons vending goods, wares and merchandise * * * shall be deemed peddlers," and the second section of that chapter prescribes a penalty for selling by such persons without first having obtained license therefor. Section 6 of article 3, chapter 92 of General Statutes, declares that all contracts made by peddlers without license shall be void. These statutes went into effect December 1, 1873. February 21, 1874, an act was passed, entitled "An act to amend chapter 84 of the General Statutes, title 'Peddlers,'" which reads: "That chapter 84 of the General Statutes, title 'Peddlers,' be, and the same is hereby, so amended that itinerant persons who are citizens of this State, and who vend exclusively goods, wares and merchandise, which are the growth, product, or manufacture of this State, shall not be deemed peddlers, nor required to take out license under the provisions of said chapter."

The only question is whether the act of 1874 operates to repeal the general law which requires all itinerant persons selling goods, wares or merchandise, wherever manufactured, to first obtain license therefor. The act of 1874 is in terms "An act to amend" and can not be construed to be a repealing act except by implication. It is insisted that it repeals the entire

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law requiring license because it discriminates against the citizens and manufactories of other States, and renders the whole law unconstitutional as it violates the provisions of the Federal Constitution which entitles the citizens of each State to all the privileges and immunities of citizens in the several States, and the further provision that gives Congress power to regulate commerce between the States. Such discriminations, it goes without discussion, are unconstitutional, and that the act of 1874, when construed with the then existing license law, makes the discrimination is perfectly clear. That the legislature could have repealed the entire license law is unquestioned, but that is not the inquiry; it is, did they so intend? The act of 1874 is expressly declared to be amendatory of the general law, and not an act to repeal. It can only be held to repeal the general law by implication, and that implication established in the face of the express declaration that it was intended to amend. Repeals by implication are not favored by the courts. The legislature, which alone has power to enact laws, must ordinarily be interpreted to mean what it says in the language used by it. It would be judicial legislation to hold that this avowed amendatory act was intended as a repealing act. It can not be assumed that if the attention of the legislature had been called to the fact that the discrimination against the citizens of other States would operate to repeal the entire law in reference to license to peddlers that the law would have been passed. The vice is not in the original license law, but in the amendment. The original law is not objectionable because it requires license from every one vending wares or merchandise, regardless of citizenship and place of manufacturing or production. The act of 1874 being unconstitutional, the General Statutes in reference to license to peddlers is still in force.

Judgment affirmed.

Thos. E. & E. C. Ward for appellant.

R. H. Cunningham and Helm & Bruce for appellee.

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BENGE v. HIATT'S ADM'R.

(Filed March 14, 1885.)

1. Parent and child—Illegitimacy—Father agreed to educate and support his illegitimate child in consideration that its mother would surrender all right to its custody. Held—The child might enforce the contract against the father.

2. Statute of frauds—Land—Verbal agreement—Where one verbally agrees to convey land in consideration that another will do some act, which he does (though no action can be brought to enforce the verbal promise), yet if the party can not be restored to his original condition prior to the contract compensation may be recovered for the performance of his part of the contract, to be measured ordinarily by the value of the land.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor.

The infant appellant, Joseph Benge, instituted this action by his next friend and guardian against Samuel Hiatt's administrator in the Garrard Circuit Court, asking a judgment for the sum of $6,700 against the estate of the intestate by reason of a contract alleged to have been made by the mother of the infant with the intestate for the infant's benefit. The case went off on demurrer, and the only question presented is as to the sufficiency of the petition.

It is alleged that the mother being an unmarried woman, and the infant the natural son of the intestate, the latter being desirous of having the custody of his child that he might raise and educate him according to his own wishes, and the child being at the time about three years of age, and living with and in the mother's custody, "the said decedent came to plaintiff's mother and proposed to and contracted and agreed with her, as the mother and legal custodian of the child, that if she would surrender the plaintiff to him (the intestate) and permit him to have the raising, care and custody of plaintiff during the period of plaintiff's minority, in consideration thereof the decedent would take plaintiff, clothe, protect, maintain and educate him according to decedent's pecuniary ability, and in addition thereto would give him $1,000 in money and the tract of land on which the intestate then lived of the value of $2,700.

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"That the contract was entered into in behalf of the plaintiff by the mother, and in pursuance thereof she surrendered her legal right to his custody unto decedent, who immediately took him into his custody and control, carrying him to the home of the intestate in discharge of his contract. The plaintiff was then about three years of age, and his father, when plaintiff was about four years of age, was taken suddenly ill, speechless and unconscious, and died in a few days without making any provision for the plaintiff.

"That his estate was of the value of $30,000, and descended to his collateral kindred, his father never having married; that the land has been sold and the administrator about to distribute the estate.

"He asks to recover the value of the land, $2,700, the $1,000, and the value of his future support and maintenance, $3,000."

It is maintained by counsel for the appellee that the agreement on the part of the intestate is without any consideration and not binding on the part of the mother, and, therefore, the demurrer was properly sustained.

A contract must be obligatory on both parties or neither will be bound, and while this is the general rule we are unable to perceive in what manner it affects the question before us.

That the mother was entitled to the custody of the child, to its society and labor, burdened with the care of maintaining it until able to maintain itself, will not be doubted, and when surrendering this custody to the natural father and executing in full her part of the contract in behalf of the infant plaintiff, we see no sufficient reason for adjudging that such an act on the part of the mother constitutes no consideration for the promise on the part of the father.

The common law afforded no remedy as against the father for the support of his illegitimate offspring, but where such a relation exists there is a strong, natural and moral obligation on the part of the father to contribute to the illegitimate child's support, and although such considerations may not be sufficient

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to support a mere promise to pay either money or property in discharge of this moral duty, when the mother surrenders to the putative father the custody of the child on an express promise that he will support and maintain it, such a contract should be enforced. It must be conceded that the father can be made to respond in such a case by reason of his contract alone, and that such a contract must be based on some other consideration than the mere natural obligation resting on him to support his offspring, and recognizing this as the rule we are satisfied the consideration alleged, if established, authorizes a recovery. The statute of this State enables the mother to compel the father to maintain his illegitimate child, and while this statute should be regarded more for the purpose of indemnifying the State against the demands of such helpless infants for support, it nevertheless relieves the mother from the burden and compels the father to discharge a plain duty. A promise to pay for the support of the child in the event the father will not be coerced into payment by reason of the statute has been enforced by this court not only for what would be deemed a reasonable sum, but for a much larger amount.

In the case of Clarke v. McFarland, 5 Dana, 45, the mother agreed with the father in consideration of her promise to forbear to proceed against him under the statute, he would from time to time make such auxiliary contributions in money as might be necessary for her support, and at the same time agreed that he would secure and pay to the mother for the child whenever requested the sum of $10,000. This court held that the promise was binding, and that the apparent extravagance of the promise would not authorize the court to say that it was not legally binding.

The facts alleged in this case are all to be taken as true, and the father's promise to educate and maintain his own child and give to it money and property amounting to $3,000 or $4,000 in the event he is permitted to have its custody, is not such an inadequate consideration as will imply fraud or bad faith on the part of those presenting the claim, and if the

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mere forbearance to coerce the father into payment is a sufficient consideration the separation of the child from the mother and transferring the care and custody to the father is not only a sufficient consideration for the promise, but is that character of contract the value of which can not be well estimated by dollars and cents.

Here the child was actually delivered to the father, taken to his home, the latter assuming the legal responsibility of the support and education of the only object of his affection, and promising the mother in behalf of the infant, in consideration of the surrender of her claims, to give to the child a certain specified sum of money and a home of the value of $2,700. What higher or greater consideration could the mother have surrendered or given than the right to the care and custody of her child? The child should not be punished by reason of the crime of its parents, or the courts of law and equity closed against such contracts, that, when clearly established, are based upon the plainest principles of natural justice. The contract is, therefore, binding on the father, and the next question presented by counsel is that it is within the statute of frauds, and, therefore, can not be enforced. The agreement on the part of the mother had been fully performed. The infant was in the custody of the father, under a contract that had never been rescinded, and while the promise to convey the land could not be enforced because not in writing, and for the additional reason, as alleged, that it had been sold by the heirs, its equivalent in value can be given, not as the measure of damages for failing to convey the land, but as constituting in fact the standard of value agreed on by the father for the relinquishment or surrender by the mother; and so of the $1,000 agreed to be paid as alleged. The mother can not be deprived of the child and no damages awarded or compensation made, because the consideration agreed to be paid was not in writing.

In the case of Berry v. Graddy, Adm'r of Belt, 1 Metcalfe, 602, Graddy had incurred a heavy expense in the purchase of a farm in Kentucky, and was induced to do so by

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Belt, who was an uncle of Graddy's wife, belt promising to pay $5,000 of the purchase money in three years if Graddy would purchase the place and not remove to Mississippi. Graddy performed his agreement, and the statute of frauds being pleaded, it was held that as he could not be restored to the situation in which he was in before the contract was made, nor compensated in damages by any other standard than that furnished by the contract itself, it would be a fraud to deprive him of the benefit of it on the ground that it was verbal merely.

It would be difficult to estimate the value placed upon the surrender by the mother of the object of the contract, in this case, in confiding her child to the care and custody of the intestate, and, therefore, following the case cited, we can only measure the amount of recovery by the pecuniary standard fixed by the father.

The care, custody and education of the child were with the father, and this obligation discharged by him as long as he lived, it was purely personal, and for its future support we perceive no remedy. The personal representative is not entitled to the custody of the child or required to educate it. It was a personal trust confided to the father only, and the obligation to do so terminated in the death of the intestate. The agreement to give the child $1,000 and the farm of the value of $2,700 took effect when the contract was performed by the mother, and the obligation to do so at once existed, and could, but for the statute requiring sales of land to be in writing, have been enforced as to the land, and as the intestate received the consideration upon which his promise rested, and disposed of that which he had agreed to give or failed to comply with the agreement, its equivalent in value is the measure of recovery to the extent the promise to convey is involved.

It is not necessary that this court should determine the ques- and tion raised as to the right of the mother to make an absolute unconditional disposal of her illegitimate children, but when the mere right to the custody, care and education of the child is surrendered to the natural father, the chancellor, where the

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father is able and willing to provide for the child, and is in other respects a proper person to raise it, would not under such a contract as this require its restoration, that the State might support it or confide it again to the care of the mother by reason alone of her natural claim to the custody of her offspring. The care and well being of the child in such a case would control the action of a court of equity, and the doctrine of filius nullius would not be in the path of the chancellor in the attempt to provide for those whose existence can be attributed alone to the criminal misconduct of both the natural father and mother. It results, therefore, that the demurrer to the petition should have been overruled. The case is remanded for proceedings consistent with this opinion.

Welch & Saufley and T. P. Hill, Sr., for appellant.

Wm. McKee Duncan and Burdett & Walton for appellee.

SUPERIOR COURT OF KENTUCKY.

McMURTRY v. VOWELLS.

(Filed March 18, 1885.)

Rescission—Failure of title—Rents and improvements—Where a contract for the exchange of land is rescinded (for failure of title of one party), and each is required to restore the tract received by him, each is entitled to compensation for improvements made by him to the date of rescission to the extent they have increased the vendible value of the tract, and is chargeable with rent estimated on the value of the tract in that condition in which he received it—i. e., its condition before he improved it. (2) If either party make improvements after judgment of rescission he can not have compensation therefor except as an offset to rent; and the rent will be estimated on the increased value of the land in its improved condition.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bowden.

October 25, 1876, Vowells began an action in equity to obtain a rescission of a contract of exchange of real estate made between him and McMurtry April 20, 1874, whereby McMurtry got a house and lot valued at $2,250, and Vowells got a farm,

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valued at $20 per acre, to be thereafter surveyed, the excess to be paid in money to the one entitled, and conveyances were to be made. July 24, 1878, judgment was rendered rescinding the contract, ordering McMurtry to surrender possession of the house and lot, and Vowells to surrender possession of the farm by January 1, 1879, and referring the matters in regard to rents and improvements to the master. McMurtry prosecuted an appeal to the Court of Appeals, without superseding the judgment, which was affirmed April 22, 1880. The order of reference was renewed several times pending the appeal, each party retaining possession of the property he was ordered to surrender, except that McMurtry surrendered about the 1st of January, 1880, a part of the lot to a person to whom Vowells had sold it. At the end of that year there was a full surrender by each. Afterwards the master reported a balance in favor of McMurtry of $516.50; Vowells' exception to the report was sustained, and it was adjudged that the rents and profits, reduced by the improvements made by each, be set off as being equal. McMurtry again appeals.

In Ewing's Heirs v. Handly's Ex'ors, 4 Litt., 346, it was said, apologetically, in response to a petition for a rehearing in which a former opinion was changed, that the criterion in regard to rents and improvements "is a subject of acknowledged difficulty." In Bartlett v. Blanton, 4 J. J. Marsh., 440, it was said that "the cases of Griffith v. Depew, 3 Marsh., 177; Richardson v. McKinson, Select Cases, 320; and Ewing's Heirs v. Handley's Ex'ors, 4 Litt., 371, prove the difficulty in ascertaining what the general rule ought to be, if they do not prove there is no general, well-settled rule on the subject." Counsel in this case concur in the statement that the law is plain enough, and that the only question to be debated relates to the facts; they differ, however, very widely as to the rule that ought to be applied.

It was the opinion of the learned judge who tried the case that a general rule had never been, and could not be, prescribed, but that every case must be decided as its peculiar facts may require in order to do justice between the parties.

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When an account of rents and improvements is to be taken between an occupant and a successful claimant of the land, there may be disturbing considerations which do not occur when it is taken between those whose relation as vendor and vendee has been dissolved by decree of court; and it may be that in the latter case the rule ought to be different when that relation was induced by the fraud of one of the parties, and when it was not. If the contract is rescinded for no other reason than that the vendor is unable to make a good title, the object of the court should be to so adjust the equities of the parties arising out of the dissolved relation as to place them as nearly as possible in the condition they would have occupied if there had been no contract.

We do not understand that the contract in this case was rescinded on the ground that McMurtry had induced Vowells to enter into it by fraudulent conduct, but merely because he could not make a good title.

When property is restored, exact restitution requires that the party shall receive precisely what he let go out of hand, and a fair compensation for its use. If that can not be done, it should be approximated as nearly as may be. There are, therefore, two things to be considered: The subject-matter of the contract, and the use of it.

A restoration of the subject-matter, when it has undergone no change, is a complete restitution of all except compensation. But if it has been deteriorated by wasteful processes, he who has diminished its value should be charged with the sum required to make it good. If, on the other hand, its value has been increased by his means and labor, the party to whom it is to be restored should be charged the exact amount which the outlay has added to the value. In this case it is irrelevant to inquire what the improvements cost the occupant, except for the single purpose of preventing his recovering more than he paid. If he expended money in improvements on the land beyond the point which limits the increase of value the excess is lost the moment it is expended. For example, if the land is

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worth $1,000, and its environment is such that no building, however magnificent, could increase its value beyond $5,000, the erection of a building at a cost of $10,000 is itself the losing act. If the occupant retains the land by an incontestable title its value is only $5,000, and he has, by the act of erecting the building, lost $5,000 as completely as if he had thrown it away. The party to whom he is to restore the land can not be charged with what he has thus invested, not as the representative of a commerical value, but as expressing merely an uncommercial fancy, for the value of which there is no legal measure. On the other hand, while he who is to take the property back can not complain on principle that he is required to pay only so much as the vendible value has been enhanced, yet he may find himself injured in the practical result; he may not desire to invest that much in that way; he may not have the means to pay; he may not wish to sell, yet may be forced to submit to a sale; he may not be able to find a purchaser at the price required to pay the other party and leave him the value of the land as it was when he let it go; and it may be at least sold for a sum not more than enough to pay for the improvements.

These difficulties lie in the way of exact justice when the occupant has made the improvements supposing that he was spending his own money on his own land, whether for practical or esthetic purposes.

In determining whether he improved in good faith or not, it seems reasonable that the case should depend on facts, and not on legal imputations. It is a question of fairness, of true purpose. He will not be held to have improved in bad faith because he is presumed to know the law, and, therefore, is to be taken as having known that he could not hold the land—as where, for example, his vendor was a married woman. There was once a theory that the law, when declared by the court, was supposed to have been always theretofore known—a theory which seems to have been designed as an anticipation and avoidance of Bentham's stricture on "judge-made law." But it seems reasonable that the occupants who, having purchased

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and having common reason to believe himself in possession of his own estate, spends his money in creating such conditions as suit his need, his convenience, or his taste, should not be told he was a fool for his pains because the court, after doubting and still uncertain, has decided the law to be against him. If, however, the facts before him are such as to reasonably satisfy a man of ordinary care that he is not improving his own land; that he is erecting improvements not for his own use and enjoyment at his own cost, but for the benefit of another and to be paid for by him, his claim for compensation, if it exists at all (and for some purposes and in some cases it may exist), rests upon a basis quite different. It seems that it can not be set up as an independent demand, but only as a benefit to be considered in diminution of a claim against him.

The rule seems to be that the vendor upon rescission takes back the land, and is entitled to indemnity to the extent that it has been injured by negligent and wasteful conduct, and is to be charged with the amount which lasting improvements have added to the vendible value of the land, as estimated when the account is taken. This is supposed to be as near restitution of the thing itself as can be fairly made.

What rule shall measure his compensation for the use in the meantime is a difficult question. Recourse to adjudged cases does not make it easier to answer. If the real purpose is to place the parties in a condition as near what it was before the contract was made as can be fairly done, it would seem that one should not complain if he is awarded for the use of the place just what he might have realized by renting it to careful tenants. It is not easy to see why it is necessary to complicate with this question of compensation for use the one we have considered in regard to improvements, in order to determine the basis on which the rental value is to be estimated. In taking back his property the vendor is not charged with the prime cost of improvements; their original condition is not made even a subject of inquiry; what they cost and what their condition was are matters not relevant to the issue; he is re-

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quired to pay only what they actually benefit him when he gets his place again, because nemo debet locupletari aliena jactura; he must take, and he is, therefore, required to pay for, an advantage inseparably incorporated in his land as part of it, and for that reason. If during the time he was out of possession his place, as it left his hands, was incapable of use, and, therefore, had no rental value, he has lost nothing by the mere fact that during that time it was under the nominal dominion of another. If the occupant has wrought such expensive changes as create a rental value, it is an outlay by the occupant of his own means for which the vendor does not account; the rental value is the occupant's only reward for the difference between the prime cost of the improvements and the amount at which they are finally estimated as having enhanced the vendible value of the land; and that this difference will in most cases be considerable is attested by an experience as painful as the observation is pleasant, that "fools build houses and wise men live in them." If A sells B a tract of woodland, and after years he takes it back on a rescission, still in the same condition, upon what ground can he claim compensation for the use of that which was not and could not be used? He has been deprived of nothing; he is not out of pocket one cent which it would have held if the sale had not been made. If the timber is worthless, and B clears it all off, erects fences, builds houses, and plants field and garden, making that useful which was before useless, why should A in this case more than in the other be entitled to rent? Does he thereby lose anything which he would have had if B had done nothing? If so, and to whatever extent it is so, he should be paid. Possibly the soil may be of such sort that deterioration inevitably begins with the first planting; in that case he is being impoverished by the use itself, though skillful.

It seems that even in such cases such items belong rather to the account pertaining to the condition of the things sold and to be restored than to that which relates merely to its use. It would be a species of spoliation to award A rent upon improvements which he did not pay for and which he will not be re-

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quired to pay for, it being kept in mind that he does not account for the improvements used, but only for such as may remain after the use has ceased, and then not for their value, to be ascertained by what it would cost to put them there just as they are, but only to the extent that in their condition they stand for so much money to be turned over into his hands.

The rule seems to be that the vendor upon rescission is entitled to recover the reasonable rental value for the use of the place, to be estimated on the place as it was when it went out of his hands.

It may not be possible to fix a time for every case up to which this rule should prevail. It seems, however, that it should be applied so long as the occupant should be permitted to recover for improvements as made in good faith on the supposition that he is spending his money on his own land for his own use. This point should seldom, if ever, lie beyond the judgment of rescission. But wherever the particular facts of the case may justly locate it, there the relation of the parties changes. The vendor is potentially, if not constructively, in possession again; he stands charged with the enhanced value of the place, as debtor to the vendee; he is entitled to the rental value of the place as it then is. This right is not affected by the fact that the vendee has a lien on the place and may hold it as security. It is not his property.

If he makes improvements after the turning point has been reached, it seems clear that he can not require them to be estimated as part of his claim for improvements, for which the vendor is to be charged though the amount exceeds the rents; but it seems that the enhancing value of such improvements may be considered as a mode of adjusting rents, operating not to create a demand in favor of the occupant, but as an argument and just reason why the other party should not urge a demand against him. For even when the occupant has passed the designated point he does not become technically a tenant; he is still in equity; and the account, usually taken sometime after the judgment for rescission, is made up in order to an

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equitable adjustment rather than under the influence of set legal rules.

When money is paid by the vendee the law of interest fixes the value of its use. If he pays partly in property which is restored to him, he occupies with regard to it the position of a vendor, having his rights and being subject to the correlative burdens. In an exchange of lands each is a vendor as regards the place he lets go, and a vendee as regards the place he gets. We do not forget that there are cases which hold that when parties exchange lands there is to be no account of rents, as the exchange implies their opinion that the places were equivalent in value. That implication is very just, but it is not relevant. It is not a question whether the values of the places were the same, but whether the values of the uses were the same.

A, owning a woodland, exchanges it with B for an open farm. B looks to the future for his profits in the growth of trees. A gathers his profits every year. On a rescission shall A retain all the yearly profits gotten from the farm, and yet get back again all the profits that lie untouched in the trees, where every circling annulation marks the gain? The cases of this sort do not seem to us consistent with those which properly distinguish between the value of the place and the value of the use.

It remains to apply these conclusions to the case before us. McMurtry, owning a farm, exchanged it with Vowells for a house and lot, Vowells agreeing to pay the difference in value in money. The contract was rescinded by the court because McMurtry could not make a good title to the farm. The master fixed the day on which Vowells filed his petition as that beyond which neither could be regarded as having made improvements in good faith. McMurtry resisted a rescission, claiming that his title had been perfected.

It does not seem to us that the mere act of beginning suit should be conclusive; indeed a defense of such an action is consistent with the utmost good faith and an assured convic-

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tion that it should not, and can not, succeed. It seems to us that the date of the judgment rescinding the contract is that which changed the relation of the parties. Up to that date each should be allowed for lasting improvements whatever they increased the vendible value of the place so improved; and each should be charged a fair rent on the place as it was when it came to his hands. After that date each should be charged a fair rent on the place held, as it was at that date, modified by subsequent changes, if any, affecting the rental value. The enhancing value of improvements made by either party after that date can be allowed only as a mode of payment of a balance of rents, and if there is no such balance against which they can be set-off, no allowance whatever can be made on account of them. The money to be paid as the difference between the values was not paid, and that matter is entirely exscinded from the account.

The judgment of the court, disregarding the master's report, did not undertake to adjust the accounts at all, but assumed rather that the case was such that there were none to be adjusted. It was rendered pending a re-reference to the master ordering a statement of the case according to given rules.

There should be a re-reference for a report conforming to the principles of this opinion, with leave to the parties to take additional evidence if it is considered necessary.

The judgment is reversed and the case remanded for further proceedings.

Little & Slack for appellant.

Sweeney & Son for appellee.

BOULWARE'S ADM'R v. PENDLETON.

(Filed March 18, 1885.)

Mortgage—Describing property—A mortgage of "my present crop of tobacco and other crops with other property to me belonging," is a too indefinite description to pass title to anything but the tobacco.

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Appeal from Daviess Circuit Court.

Opinion of the court by Judge Ward.

This suit was supplementary to a suit which was instituted on the 19th of February, 1877. All of the papers in the first suit were lost, and this suit was instituted to enforce rights which, it is claimed, attached by reason of the first suit, and to restore the lost records. Before the institution of this suit the defendant in the original action died, and without any order reviving the action the case was referred to the master "to ascertain and report the state of the lost records." After the institution of this suit the master made a report, but that report was lost, and there was no further effort to restore, except some proof was taken, and the court, in the judgment in this case, determines that an attachment was issued in the original action; that it was levied on specified property, and a forthcoming bond given, etc., and then sustains the attachment, renders judgment for the debt, and proceeds to subject the attached property, and to render judgment against the surety for that not produced.

By the loss of records, death of the defendant in the first action, and for many other reasons, the case is involved in great confusion and doubt, and has given rise to much trouble and some doubt as to what is the just and right conclusion. After much reflection and perplexity over minor questions of practice, we see no way out of the difficulties except to go directly to the main question in the case, and on that let the case be determined.

On that question there is enough in the record to enable the court to speak with certainty, and as we can not say either party is more at fault than the other for the loss of records, or failure to restore them, we will waive the practice questions relied upon by both parties, and determine the case on the issue where it must finally rest, if the suggested defects could be and were put at rights.

The suit was based upon a mortgage given by Richerson Wilkerson to E. C. Pendleton on the 9th of October, 1876, to

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secure the payment of $250. The attachment was a specific attachment, sworn out only to secure the property for the satisfaction of the mortgage debt. Waiving all other questions as to the attachment, it is evident that it could not be sustained unless the attached property was covered by the mortgage.

It is claimed on the one hand that all the property levied upon was embraced in the mortgage, on the other hand it is claimed that none of it was embraced in the mortgage except the tobacco. Which of these claims is true is the decisive question in the case.

It is claimed that none of the attached property, except the tobacco, is embraced in the mortgage for two reasons. First, that the description in the mortgage is too indefinite; second, if in ordinary cases it was sufficient, it is not sufficient in this case, because the attached property was exempt from execution or attachment for debt, and if the mortgage is sufficiently definite to cover any property, it could only apply to that which was by law liable to be taken in execution for debt. The facts showing that the property levied upon was exempted property are not alleged to have existed at the date of the mortgage, and for that reason it may be said the latter objection has no force.

But, on the other hand, it is not alleged that the defendant owned this property at the time he gave the mortgage. The allegation is, that under the mortgage he held a lien on the property, describing it, but whether there was a lien or not, admitting that the description was sufficient, would depend on the fact whether the mortgagor owned the property at that time. But the proof is clear both that the mortgagor owned the property at the time the mortgage was made, and that it was then exempt from coercive sale. So waiving these, with other defects and omissions, the questions recur as above stated.

The descriptive part of the mortgage is as follows:

"I mortgage my present crop of tobacco and other crops, with other property to me belonging, to the said E. C. Pendleton, with all rights, titles and interests in the same." There

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is no description of location by place, county or State; no description of kind, quality or condition. Is the description good, or is it void for uncertainty?

Mr. Jones, in his work on Mortgages, volume 1, section 56, says:

"A description, however general and indefinite it may be, if by extrinsic evidence it can be made practically certain what property it was intended to cover, will be sufficient to sustain the lien. * * * A mortgage 'of all my estate,' or 'of all my lands, wherever situated,' or of all my property is not invalid by reason of the generality of the description."

But the cases would hardly seem to justify the sweeping doctrine of the text. For instance, in Starling v. Blair, 4 Bibb, 288, the description was "all the lots that he then owned in the town of Frankfort, whether he had legal or equitable title thereto."

In Goulding v. Sweet, 13 Gray, 518, the description was "all the farming tools and personal property in and about the barn and premises of Herbert Hall." This was held to be sufficient to embrace a carriage proven to have been on the premises at the time the mortgage was given.

In Winslow, &c. v. Merchants Ins. Co., 4 Met. (Mass.), —, the description was, first, that of a particular lot and building, and "all and singular the tools, goods and chattels, and other property thereon, or that might thereafter be put on it." Held to embrace all that was shown to be on the lot at the time the mortgage was given, but not that thereafter acquired.

In Harding v. Colburn, 12 Met. (Mass.), 338, the description was "all my tools and implements in my shop at B." Held sufficient.

The question was fully considered in the latter case and the principle stated that if the description was such that evidence could make it reasonably certain what was intended this would be sufficient, as, no matter how particular the description might be, it might be necessary to hear evidence to identify the property, as if it was a bay horse, or a roan cow, or any other thing. But with a description which gives a starting

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point by place, location or kind we can readily see how the property can be made certain; but when all this is absent it would seem to widen the field to such an extent as to invite and encourage negligence and carelessness, and to offer a premium for looseness, that the negligent might profit thereby. Parties should not be encouraged in practices which lead to such results, nor to embarrass the courts with contentions, which, by the exercise of the most ordinary prudence, could be avoided. Certainly the law as ruled in the cases cited is sufficiently broad and liberal to meet the necessities of the careless to an extent beyond which it is neither safe nor prudent to go.

It may be said in this case this was all the property the man had, and, therefore, reading the mortgage in the light of that fact it is very simple, but this would rather seem to increase than diminish the difficulty, because this all was exempt from execution, attachment or distress for rent, and a man might be very willing to mortgage his property which was liable for debt, and not at all willing to mortgage that which was not. He might be willing to mortgage his crop of tobacco and other crops, though in this case it does not appear that he had any other than tobacco, and yet unwilling to mortgage his last horse, cow, bed and bedding. The mortgagor may have thought that the general description did not cover his exempted property, and that he did intend to embrace it in the mortgage ought to be made manifest, and not left to conjecture or doubt. It is worthy of consideration that the particular description of property broke down just at the point where it is claimed the general description covers the exempted property.

But it is insisted that the question as to whether the property was exempt or not can not be made by the administrator; that if it is exempt it belongs to the widow and children of the intestate; but we have considered this question only in connection with the descriptive part of the mortgage and in construing that. If the plaintiff has a right to the property, or lien on it, it is by virtue of his mortgage, and if the property is

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embraced in the mortgage the death of the mortgagor does not take it out of lien. If it is not in the mortgage it is not subject to the lien, and the administrator has the right, and it is his duty, to defend the property against the lien claim, and if successful therein to set it apart to the widow and children if they are entitled to it. The personal property of an intestate passes to the administrator, and it is his duty to have the property set apart to the widow and infant children as provided by law, and he can defend the title and possession to enable him to discharge that duty. We are of opinion that none of the property was embraced in the mortgage except the crop of tobacco, and the judgment is reversed and the cause remanded for judgment and final disposition in accordance with this opinion.

Owen & Ellis for appellant.

Williams & Powers for appellee.

NEW BOOKS.

Meyer's Federal Decisions. U. S. Supreme, Circuit and District Reports, with Opinions of Attorneys General. Arranged by William G. Myer. Vol. VII, Constitution and Laws—Contractor. Gilbert Book Co., St. Louis, Mo., 1885.

This series aims to condense the 292 volumes which comprise the U. S. Supreme, Circuit and District Reports and Opinions of the Attorneys General into 20 volumes. This is to be done by giving only the most important cases in full and abstracting the others. As a guarantee that the editor, Mr. Myer, does his work of selecting judiciously, each volume is submitted to some gentleman competent to judge, who certifies his opinion. The present volume has the endorsement of both Mr. Hammond, Dean of St. Louis Law School, and Mr. Schouler, the well-known law writer. We have had little idea of the magnitude of his undertaking until the appearance of this the 7th volume. It begins now to take shape, and to display some-

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thing of its mammoth proportions, and gives an idea of the energy and enterprise, the great labor and vast outlay of capital required to develop it. It deserves generous encouragement from the profession. If the whole of the editorial work of Mr. Meyer were left out, and the work were only a reprint of the Federal Reports, who doubts that it would well be worth the purchase price? We have examined this the latest volume with great interest, and find nothing in it to criticize—there is no cross-index, but that will doubtless be supplied at the end, in the index number.

Law of Presumptive Evidence, including Presumptions of Law and Facts and Burden of Proof in Civil and Criminal Cases, reduced to Rules. By John D. Lawson; A. L. Bancroft & Co., San Francisco, Cal.

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ABSTRACTS OF CASES

——IN THE——

COURT OF APPEALS AND SUPERIOR COURT

Not to be reported in full—Alphabetically arranged according to their subject-matters.

Appeals—See Supersedeas Bond, 1—

1. Cross appeal—As to the defendant the judgment against him determines the amount in controversy, whether the judgment be contested by direct or cross appeal.

   A cross appeal, prosecuted to reverse a judgment against the appellees for $80, is dismissed, the court having no jurisdiction thereof. Cannon v. Edwards, &c. April 1, 1885. Warren Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Mitchell & DuBose for appellant; Rodes & Settle for appellees.

2. Jurisdiction—An appeal to the circuit court from an order of the county court rejecting a claim is a proceeding to establish the claim, and not in the nature of a mandamus to require a levy to pay it. A judgment in the circuit court for the claimant is a "judgment for the recovery of money," and the amount being less than $100, this court has no jurisdiction. Lincoln Co. Ct. v. Hansford. April 1, 1885. Lincoln Cir. Ct. Opin. by Bowden, J., Sup. Ct., dis. D. R. Carpenter, T. P. Hill, Jr. and J. B. Paxton for appellant; Welch & Saufley for appellee.

Assignment—See Contract—

1. Claim against decedent's estate—Where a claim against a decedent's estate which has been allowed by the court is assigned by the claimant there is an assignment of an allowed claim of so much, and not an assignment of the original cause of action, and no inquiry can be instituted as to the assignability of the original evidence of indebtedness.
2. Judgment or replevin bond non-assignable—Neither a judgment nor a replevin bond is assignable under the statute so as to vest the legal right in the assignee. From the act of assignment the law does not imply a promise on the part of the assignor to repay the consideration if, after due diligence, the amount due on the judgment or replevin bond can not be made; that implication exists only when there is an assignment of a right made assignable by the statute. Crawford v. Duncan. April 15, 1885. Pendleton Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. H. Clay White for appellant; John H. Parker for appellee.

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Assignment for Benefit of Creditors—

What constitutes—A transfer of property by an insolvent debtor does not operate as an assignment for the benefit of creditors unless the vendee is a creditor of the vendor, or the money paid by him to the vendor is used to pay a creditor, or there is some agreement between vendor and vendee by which the vendee is to pay some one or more of the vendor's creditors. Until some act is done by which one creditor will secure an advantage over other creditors there is no assignment for the benefit of creditors within the contemplation of the statute. Ouerback, Gilmore & Co. v. White, &c. April 1, 1885. McCracken Ct. of Com. Pleas. Opin. by Ward, P. J., Sup. Ct., aff. W. D. Greer for appellants.

Attorney and Client—

Contract for fee construed—Appellee, a creditor of an insolvent corporation, employed attorneys to bring suit upon his claim, agreeing to pay them a sum equal to 10 per cent. of any amount that should thereafter be realized from the claim, "whether by suit, compromise or otherwise." Pending an action in equity, after a judgment at law had been obtained and a return of "no property," appellee, with the consent of his attorneys, formed an association with others for the purpose of purchasing the property of the corporation under a judgment directing its sale, and did purchase it, realizing therefrom a large sum of money. In this action by the attorneys to recover 10 per cent. of the sum thus realized, Held—That the words "or otherwise" in the contract were intended to refer to what might be realized by appellee by reason of the efforts of his counsel, and that the compensation of the attorneys should be confined to the value of their services in bringing the several actions unless those services contributed to enable appellee to realize his debt. Simrall & Bodley, &c. v. Morton. April 28, 1885. Jeff. Ct. Com. Pleas. Opin. by Pryor, J., Ct. Ap., rev. Isaac Caldwell and A. P. Humphrey for appellants; Barnett, Noble & Barnett and W. O. & J. L. Dodd for appellee.

Bankruptcy—

1. Effect of discharge—When a debt was provable at the date of an adjudication in bankruptcy and has subsequently been reduced to judgment, the discharge operates upon it, if proved, whether it is formally presented as the claim existed before judgment was rendered, or as a judgment on that claim, whatever may be the law, when neither the judgment nor the claim on which it is based is proved. Mulhagen, &c. v. Carter, &c. April 15, 1885. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Weir, Weir & Walker for appellants.
2. Pleading discharge—A debtor relying upon a discharge in bankruptcy must allege facts showing that the court granting it had jurisdiction both of the person and subject-matter. Reidhar v. Pfeiffer. April 22, 1885. Jeff. Ct. Com. Pleas. Opin. by Richards, J., Sup. Ct., rev. Goodloe & Roberts for appellant; Elliott & Hemingray for appellee.

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Bastardy—

While bastardy proceedings must be in the name of the Commonwealth, and are within the control of the county attorney, they are in no sense criminal or penal prosecutions, and contracts for their settlement, if fairly entered into and executed, will be upheld and enforced.

In this case, the mother of the bastard being an infant, a note executed to her mother by the putative father, in consideration of the dismissal of a bastardy proceeding against him, is held to be binding. The fact that the contract was made with, and the note payable to, the grandmother of the bastard can not be urged as defense, the grandmother being the natural guardian of the mother and charged with her support. Jenkins v. Neighbors. Same v. Clark. April 29, 1885. Warren Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Gorin & Son and Ira Julian for appellant; John B. Grider and E. W. Hines for appellees.

Bills of Exceptions—

1. Time of filing—Where the time for filing a bill of exceptions is extended to a day in the next term, and the bill is tendered within the time thus allowed, though not signed and filed until a subsequent day, the requirements of the law have been complied with, and this is true although the court may find it necessary to make some corrections in the bill at the time the judge's signature is affixed, provided the appellant has in good faith tendered what he considered a true account of the proceedings on the trial.
2. Instructions—It is the duty of the court and not the clerk to certify what instructions were given and refused, and where the bill upon its face indicates that this has been done, it will be treated as true unless its correctness is assailed by affidavit. Ray v. Grove. April 8, 1885. Adair Cir. Ct. Opin. by Richards, J., Sup. Ct., overruling motion. H. C. Baker and Hindman & Sampson for appellant; James Garnett and W. W. Jones for appellee.
3. Time of filing—Where a party objecting to the judge's correction of an exception which purports to state the evidence, within five days after the bill is signed files the exception as written by himself, with the affidavits of two bystanders attesting its truth, the paper so filed will be treated as containing the correct version of the testimony unless its truth be controverted by affidavits filed by the opposite side. Kaelin v. Rufenacht. April 22, 1885. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Carlisle, Goebel & Carlisle for appellant; J. Creutz for appellee.

Consideration—See Deeds, 2; Husband and Wife, 1.

Contracts—

Assignment—One who has contracted to render personal services can not transfer the claim for such services, due only in the event they are rendered, so as in any degree to limit the free action of the employer in regard to the work to be done. Hazel & Co. v. McCloskey, &c. April

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22, 1885. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Owen & Ellis for appellants; Sweeney & Son for appellees.

Costs—

1. On appeal—If one of several appellees believes a reason exists why he should escape liability for costs, he can make it known to the court before the cause is submitted, and thus obtain a discrimination in his favor, and should he neglect to do this, and a judgment be rendered against him for costs, he must have it corrected by a petition for rehearing, filed within the time prescribed by law. If neither course is adopted, and the term at which the judgment was rendered has expired, this court has no power to grant him relief. Buckler v. Rogers, &c. April 8, 1885. Robertson Cir. Ct. Opin. by Richards, J., Sup. Ct., setting aside order quashing execution. W. Buckler and W. W. Kimbrough for appellant; W. Lindsay and A. Duvall for appellees.
2. Removal of gates—In proceedings to remove gates from across a road the statute requires the applicant to pay all the costs incurred in the county court; and while he is entitled to a judgment for his costs in the circuit court, having succeeded in that court upon appeal, it is error to render judgment in his favor for his costs incurred in the county court. He must pay the costs of both parties in that court. Sandy v. Lindsay. April 1, 1885. Carroll Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Fisher & McElrath for appellant; Geo. C. Drane for appellee.

Decedent's Estate—See Assignment, 1.

Deeds—

1. Unrecorded—Although an unrecorded deed is invalid under the statute as a legal conveyance, yet it is evidence of a purchase for a valuable consideration, and where a creditor of the vendor seeks to subject the land to the payment of his debt the purchaser with the unrecorded deed may, at any time before judgment has been rendered for the sale of the land, prevent such a judgment by bringing his deed before the court.
2. Consideration—The grantee in a conveyance which recites a consideration of natural love and affection may show a valuable consideration. Thomas, &c. v. Smith, &c. April 23, 1885. Ballard Cir. Ct. Opin. by Lewis, J., Ct. Ap., rev. Substituted for former opinion. C. H. Thomas, J. D. White and C. S. Marshall for appellants; J. & J. W. Rodman and S. W. Nichols for appellees.

Depositions—

The lower court should not have rejected a deposition lodged with the papers merely because, by an oversight of the clerk, it was not marked filed. Burns, Gd'n, &c. v. Ingersoll, &c. April 23, 1885. Kenton Ch. Ct. Opin. by Holt, J., Ct. ap., rev. Collins & Fenley for appellants.

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Descent and Distribution—

1. Property exempted to widow—A widow is entitled to the articles of her deceased husband's estate exempted by statute from distribution as her absolute property, in addition to her share as distributee, although there are no children residing with her and there are children not residing with her. The provision in the Revised Statutes which directed the exempted property to be charged to the widow as distributee in such a case is not found in the General Statutes, and is, therefore, repealed. Miller's Adm'r v. Miller's Ex'or. April 15, 1885. Larue Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wm. Johnson for appellant.

2. Devise—A testator devised his lands to his wife for life, and gave her control of $2,500, which he provided should be kept at interest for the purpose of schooling and raising his infant son, further providing that if the interest should fail from any cause whatever to school and raise the boy, it should be done out of his "other estate." The widow married again and she and her husband maintained and educated testator's infant son. The fund of $2,500 having been expended in litigation over the will, and husband and wife having been divorced, the husband instituted this action, claiming compensation for maintaining and educating the testator's infant son, and seeking to subject to the payment of his claim the land devised to the widow for life.

   Held—That it was not the testator's intention to charge his real estate, further than rents and profits, with the support and education of his son, unless the principal of his personal estate, together with the other estate left the widow for life, should fail or was not sufficient for that purpose; and the plaintiff having enjoyed the estate and assumed its burden, is not entitled to any compensation for the maintenance of the child. Cannon v. Edwards, &c. April 1, 1885. Warren. Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Mitchell & DuBose for appellant; Rodes & Settle for appellees.

3. Construction—A testator, in providing for an unmarried daughter, directed his executors to invest the money in their hands for her "in such real estate as she may desire, and the title to be in her and her heirs, and if she dies without issue it is to be used like other property belonging to me."

   Held—That the testator's purpose was to invest his daughter with a fee simple title. By the words "if she dies without issue" the testator evidently meant a dying without issue before his death. If he had intended to create only a life estate he would have expressed it as plainly as he did in such a devise to a married daughter. Strossman, ex parte. April 30, 1885. Montgomery Cir. Ct. Opin. by Pryor, J., Ct. Ap., aff. Peters & Tyler for appellant.

Dower—See Practice in Civil Cases.

Elections—

1. Contested—Notice—Upon appeal to the circuit court from the decision of a contested election board it was too late after the case had been fully

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heard and investigated upon its merits to raise an objection to the notice. That objection should have been made when the case first went to the circuit court.

2. All the evidence before the circuit judge, including the poll books, should have been brought to this court and identified by a bill of exceptions; in the absence of the poll books the judgment is affirmed, but if they were before the court the character of the testimony is such that the court would not be inclined to disturb the finding. Davis v. Gatliff. April 30, 1885. Whitley Cir. Ct Opin. by Pryor, J., Ct. Ap., aff. J. & J. W. Rodman and C.W. Lester for appellant; A. Duvall, W. Lindsay and R. D. Hill for appellee.

Evidence—See Landlord and Tenant, 2—

Presumption of death—A letter purporting to have been written at the request of a person who is presumed to be dead by reason of his absence from the State for seven successive years is not competent to rebut the presumption of death, being only the barest form of hearsay; nor is a letter purporting to have been written by the person himself competent for that purpose unless there is some other proof that he wrote it than the mere fact that his name is signed to it. Chelf v. Isaacs, &c. April 1, 1885. Marion Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. John McChord for appellant; Rountree & Lisle for appellee.

Final Order—

Appointing receiver—As between an attaching creditor and a mortgagee the court declared the claim of the mortgagee to be superior, appointed a receiver, and directed him to take charge of the property in controversy and lease it for a term of nearly one year.

Held—That this is not a final order from which an appeal can be prosecuted, as a sufficient amount may be realized from the rent and from the proceeds of the sale yet to be made to satisfy the claims of both parties. But even if it appeared that the proceeds would not be sufficient, still the order would not be final, as the court can, at any subsequent term, when the proceeds of the property are ready for distribution, adjudge the priority to appellant. Lewis v. Melvin, &c. April 15, 1885. Pulaski Cir. Ct. Opin. by Richards, J., Sup. Ct., dis. O. H. Waddle for appellant; Morrow & Newell and F. F. Bobbitt for appellees.

Fraudulent Conveyance—

Parties to action—The grantee is a necessary party to an action to set aside a conveyance as fraudulent, although he has assigned the property conveyed for the benefit of his creditors, and the plaintiff having dismissed the action as to him the court has no jurisdiction to inquire into the alleged fraud. Ouerbacker, Gilmore & Co. v. White, &c. April 1, 1885. McCracken Ct. of Com. Pleas. Opin. by Ward, P. J., Sup. Ct., aff. W. D. Greer for appellants.

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Guardian and Ward—

Settlement—Compensation—While a settlement by a guardian with the county judge is only prima facie evidence between the parties interested, after its completion neither party can question its correctness, except by an action in equity to surcharge and falsify it. The guardian can not, therefore, except by such an action, claim compensation for the period covered by a settlement, in addition to what has been allowed him therein. Kirtley v. Jameson. April 22, 1885. Harrison Ch. Ct. Opin. by Richards, J., Sup. Ct., aff. Forman & Cason for appellant; L. M. Martin for appellee.

Heirs—

Liability for debt of ancestor—The fact that an heir has obtained title by descent to land in another State does not make him liable here for the debts of the ancestor, nothing appearing to show that by the laws of that State land descended constitutes assets in the hands of the heir. Watts, &c. v. Bush. April 8, 1885. Hardin Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. Wilson & Hobson for appellants; S. H. Bush and W. P. D. Bush for appellee.

Homestead—

The homestead is not exempt from liability to pay a debt contracted prior to its purchase. Ashley v. Terry. April 28, 1885. Grayson Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. G. W. Stone for appellant; J. S. Wortham for appellee.

Husband and Wife—

1. Contracts—Pleading—Consideration—While executory contracts between husband and wife will be enforced in equity if founded upon a valuable consideration and free from fraud, the statutory provision that a written contract imports a consideration does not apply to such contracts, and in an action upon an executory contract between husband and wife the consideration must be set out in the petition. Dance's Trustee v. Dance's Adm'r. April 15, 1885. Pendleton Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. J. H. Barker for appellant; C. H. Lee for appellee.
2. Will—Election—Estoppel—Where a testator devises to others property belonging to his wife, and devises to his wife other property and, with a full knowledge of her rights, she receives the property devised to her and conveys her property to the executors to enable them to execute the will of her husband, she is estopped from disturbing the division of the estate thus made, or from holding the devisees responsible for the value of her estate received by them. Arterburn, &c. v. Arterburn, &c. April 30, 1885. Lou. Ch. Ct. Opin. by Pryor, J., Ct. Ap., aff. A. P. Humphrey and Russell & Helm for appellants; Elliott & Hemingray and Muir & Heyman for appellees.

Indemnifying Bond—

Sureties necessary—Where an officer who has an execution in his hands takes from the plaintiff in the execution an indemnifying bond without

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any surety whatever, he is in no better position than if he had taken no bond at all, and, having been required to respond in damages for the illegal levy and sale, he can not be indemnified. Such a bond is not good either as a common law bond or statutory bond. Ashley v. Hobbs & Co. April 8, 1885. Nelson Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. Geo. S. Fulton and C. T. Atkinson for appellants; John S. Kelly for appellees.

Infants' Real Estate, Sale of—

Necessary probata—A statutory guardian united in a petition with a joint owner to obtain a decree to sell a vacant lot, the infants being made defendants, the petition alleging that the lot can not be divided without materially impairing its value and the value of each interest in it. Held—that the action should be treated as brought under, and to be governed by, section 490 of the Code, and not as a proceeding under article 3 of chapter 63 of the General Statutes, and section 489 of the Code to sell the lot, because it would redound to the interest of the infants to do so, although the petition alleges that the lot is producing no income, and that the interest of the infants requires its sale. All that it was necessary to show, therefore, was that the property was jointly owned and in possession; that it was a vested estate and could not be divided without materially impairing its value, all of which appears from the petition and exhibit. Burns, Gd'n, &c. v. Ingersoll, &c. April 23, 1885. Kenton Ch. Ct. Opin. by Holt, J., Ct. Ap., rev. Collins & Fenley for appellants.

Injunction—

1. Equity will not interpose by injunction to enable parties to try the title to personal property, the remedy at law being sufficient for that purpose. Cumberland River Lumber Co. v. Allen & Co. April 8, 1885. Bell Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. John L. Scott and J. M. Unthank for appellant.
2. Injunction will lie in favor of an execution defendant to prevent the sale of his exempted personal property.
3. Remedy at law defective—Existing equitable jurisdiction is not taken away by the mere act of creating a remedy at law.

   The statutory admission of an execution defendant to the remedy formerly called an action of replevin for the recovery of his exempted personal property, sold under execution, did not take away his remedy by injunction to prevent the sale of the property.

   The statutory remedy was not adequate in this case, as the property about to be sold was the debtor's only work beasts, which were essential to the making of his crops, and for that reason, if no other, he was entitled to an injunction. Hamlett v. Buckner, &c. April 22, 1885. Graves Cir. Ct. Opin. by Bowden J., Sup. Ct., rev. Ward, P. J., dissenting. Boone & Stanfield for appellant; W. M. Smith for appellees.

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nterest—

When a note is payable one day after date it will be presumed that the parties intended the conventional rate of interest to continue until the debt should be paid. McCrocklin, &c. v. Hiatt's Adm'r. April 8, 1885. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. A. P. Harcourt for appellants; Burdett & Walton, W. McKee Duncan and G. G. Gilbert for appellee.

Judgment—See Assignment, 1.

Judicial Sales—

1. Judicial notice of indivisibility—It appearing that the lot sought to be sold fronts but twenty-one feet upon a city street and is but 170 feet deep, the court was bound to take notice of the evident fact that it could not be divided without destroying its value. Burns, G'd, &c. v. Ingersoll, &c. April 28, 1885. Kenton Ch. Ct. Opin. by Holt, J., Ct. Ap., rev. Collins & Fenley for appellants.
2. Caveat emptor—The doctrine of caveat emptor applies to all sales of real estate under decree of court. If any reason exists why the purchaser should not pay the amount of his bid he can except to the report of sale and obtain the relief to which he is entitled; if he fails to do this he is without remedy. Cooper v. Hill, &c. April 29, 1885. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. W. S. Clements for appellant.

Landlord and Tenant—

1. Limitation—Where a landlord consented that the tenant should make all necessary improvements on the condition that he should rely on sales of timber for the money to pay for them, and that the tenant should be at liberty to make the sales for that purpose, and the tenant made improvements and received money for timber, it was his money to the extent of his outlay for improvements, and the landlord's only cause of action was for the surplus remaining in the tenant's hands after the improvements were paid for. Therefore, in an action by the landlord to recover of the tenant the proceeds of timber sold limitation does not apply to the tenant's claim for improvements.
2. Evidence—Against decedent—The tenant was a competent witness to prove what improvements he had made and their necessary cost, and also what service he had rendered as the landlord's agent, and what it was worth, although the landlord was dead. His death only precluded the tenant from testifying in regard to any transaction with him, or in regard to anything said, done or omitted by him. Fuller v. Wallace's Ex'or. April 15, 1885. Crittenden Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. James, Nunn & Cruce for appellant.

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License—See Mandamus.

Lien—

Purchase money—Substitution—One who loans to another money with which to pay off a vendor's lien is not thereby substituted to the rights of the vendor, and does not acquire a lien, therefore, the sureties of the vendee in the note executed for the money borrowed for this purpose do not acquire a lien by substitution to the rights of the obligee, he having none himself. Nor is a mere parol promise by the vendee that they shall have a lien sufficient to create a lien. Reid, &c. v. Jackson. April 30, 1885. Lou. Ch. Ct. Opin. by Lewis, J., Ct. Ap., aff. Kohn & Barker for appellants; C. B. Seymour for appellee.

Limitation—See Landlord and Tenant, 1—

1. Sureties—In order that a surety may claim the protection of the seven years' statute of limitation it is not necessary that the holder of the obligation should have had notice that he was only a surety. Nunn v. Pedigo. April 15, 1885. Metcalfe Cir. Ct. Opin. by Richards, J., Sup. C., aff. J. W. Compton for appellant; J. C. Muncie for appellee.
2. Surety—Death—Limitation begins to run against a judgment from the date of its rendition, and a surety in the note merged in the judgment is discharged from liability after the lapse of seven years from that date without an execution issued thereon and prosecuted in good faith for the collection thereof; if, however, the surety dies the limitation does not apply to so much of the time where there was no personal representative, nor to the six months during which an action could not be brought, but the death of the principal does not affect the surety, as execution may still be issued against him. Apperson's Ex'or v. Farmer's National Bank. April 29, 1885. Montgomery Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. J. Cornelison for appellant; Peters & Tyler for appellee.
3. Surety in sale bond—The surety in a bond made payable to the commissioner for the purchase price of property sold by him under decree of the chancellor is not released by the failure to issue execution on the bond for more than one year after its maturity. Limitation begins to run from the date of the order of the court ordering the money to be collected, or adjudging it to belong to some one of the litigants who is authorized to have it collected or to whom payment may be lawfully made. Fearons v. Taylor. April 15, 1885. Campbell Ch. Ct. Opin. by Ward, P. J., Sup. Ct., aff. E. W. Hawkins for appellant; Nelson & Washington for appellee.

Lis Pendens—

Reversal of judgment—H. instituted an action in equity, claiming to be entitled to the proceeds of a judgment in favor of G. against L. Upon final hearing the action was dismissed, but upon an appeal, prosecuted without supersedeas, that judgment was reversed, and it was adjudged that H. was entitled to the fund in controversy. Pending the appeal L. paid the judgment under an execution issued thereon in favor of G.,

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and H. now seeks to compel her to pay again. Held—That if a lis pendens was created by the suit of A. it was lost by the dismissal of the action and the failure to supersede the judgment, and that L. is protected by the payment to G. Harper, &c. v. Lee. April 29, 1885. Fleming Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. W. J. Hendrick and W. H. Cord for appellants; Andrews & Sudduth and A. Duvall for appellee.

Mandamus—

Issuing coffee-house license—The board of trustees of a town can not be compelled by mandamus to issue a coffee-house license with the privilege of selling spirituous liquors; they have a discretion in the matter which can not be controlled. It is only when they have captiously refused to take any action whatever in the matter that they can be compelled by mandamus to act; but even then the direction or result of their action can not be controlled. Carey v. Trustees of Town of Butler. April 21, 1885. Pendleton Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. Clarke & Applegate for appellant; John H. Fryer for appellees.

Married Women—

Coverture as a defense—Coverture is a protection to a married woman when sued, but it can not be invoked as a defense by one who has, upon an executed consideration, vested in a married woman title to property which he seeks to withhold. Starnes v. Maloney. April 29, 1885. Grant Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. C. C. Cram for appellant; Geo. C. Drane for appellee.

Mortgages—

Description of debt and property—Literal exactness in a mortgage is not required either as to the debt intended to be secured or the property intended to be embraced by it. The description is sufficient if it is such as to enable subsequent purchasers and creditors to ascertain with reasonable certainty the debt and property intended.

The mortgage in this case, which gives the amount of the indebtedness secured without stating how it is evidenced, and gives the exact quantity of land and the county of its location, is held to be sufficiently specific, the amount recited in the mortgage as secured by it being precisely the same as the aggregate amount of the two notes sued on. Frazer, &c. v. Taliaferro, &c. April 23, 1885. Logan Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. W. W. Lyles for appellants; H. G. Petrie and E. W. Hines for appellees.

Negligence—

Contributory—The mere fact that the owner of live stock has allowed it to stray upon the track of a railroad is not such contributory negligence as will prevent the owner from recovering for injuries done to the stock by the negligence of the railroad company. Mitchell v. Kentucky Central R. R. Co. April 1, 1885. Mason Cir. Ct. Opin. by Ward, P. J.,

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Sup. Ct., rev. Campbell & Worthington for appellant; Wadsworth & Son for appellee.

New Trial—

Special verdicts—Where the burden is on the plaintiff in an ordinary action, and the jury has returned a special verdict alone, if their findings are not sufficient to support a judgment in his favor he must move for a new trial within the time prescribed by the Code, or this court will have no power to reverse a judgment entered for the defendant. Harwell v. Stringer. April 8, 1885. Simpson Cir. Ct. Opin. by Richards, J. Sup. Ct., aff. Milliken & Bush, Geo. C. Harris and W. M. Gorin for appellant; I. H. Goodnight for appellee.

Parties to Actions—See Practice in Civil Cases, 2—

An assignee, for the benefit of creditors, may bring an action upon a contract made with the assignor without joining with him either the assignor or his creditors. Tandy's Ass'ee v. Hatcher & Co. April 15, 1885. Taylor Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Thompson & McChord for appellant; R. S. Montague for appellees.

Pension Money—

1. Pension money from the United States government is only exempt from attachment so long as it remains in the pension office or with any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto. Suter v. Stamper & Son. April 15, 1885. Owen Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. A. Duncan for appellant; J. W. Greene for appellees.
2. Pension money ceases to be exempt when it reaches the hands of the pensioner, and property in which it is invested is not on that account exempt. Ashler v. Terry. April 28, 1885. Grayson Cir. Ct. Opin. by Pryor, J., Ct. Ap., rev. G. W. Stone for appellant; J. S. Wortham for appellee.

Personal Property, Action for Recovery of—

Claim and delivery—Personal property bought, paid for and withheld by the vendor may be recovered under the provisions of the Code in regard to the claim and delivery of personal property. Starnes v. Maloney. Grant Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. C. C. Cram for appellant; Geo. C. Drane for appellee.

Pleading—

1. Payment—Where the plaintiff alleges that no part of the note sued on has been paid, and the defendant alleges that he has fully paid off the note, the issue is made up and no reply is necessary. McCrocklin, &c. v. Hiatt's Adm'r. April 8, 1885. Spencer Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. A. P. Harcourt for appellants; Burdett & Walton, W. McKee Duncan and G. G. Gilbert for appellee.
2. Insufficient denial—The existence of an alleged judgment of a United States District Court can not be disputed by a denial of knowledge or

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information sufficient to form a belief, when the defendant admits that he was a party to the proceeding in which it is alleged the judgment was rendered, and by which he would be affected. Mulhagen, &c. v. Carter, &c. April 15, 1885. Daviess Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. Weir, Weir & Walker for appellants.

Practice in Civil Cases—

1. Form of judgment—It having been adjudged that the plaintiff was entitled to "dower in the land" described in the proceedings, and commissioners appointed to make the allotment, it can not fairly be understood, from a subsequent judgment confirming the commissioner's report and describing the land adjudged to the plaintiff, that the land was intended to be adjudged to her save as dower, although it be not stated in the second judgment that it is adjudged to her as dower. Bell, &c. v. Coleman. April 28, 1885. Pendleton Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. C. H. Lee, Sr., for appellants; J. T. Simon for appellee.
2. Dismissal—It is error to dismiss an action absolutely on account of a defect of parties. It should be dismissed without prejudice. Tandy's Ass'ee v. Hatcher & Co. April 15, 1885. Taylor Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Thompson & McChord for appellant; R. S. Montague for appellees.
3. A mistake in bringing an action in equity, instead of in ordinary, can only be taken advantage of by a motion to transfer to the proper docket, and not by demurrer. Cumberland River Lumber Co. v. Allen & Co. April 8, 1885. Bell Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. John L. Scott and J. M. Unthank for appellant.
4. As the petition stated no cause of action against any one, and the plaintiff declined to amend, the court was authorized to dismiss the action as to all the parties, although only a part of them had demurred. Cooper v. Hill, &c. April 29, 1885. Washington Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. W. S. Cements for appellant.
5. Election Waiver—A motion to require the plaintiff to elect from among the defendants the one against whom she would proceed was waived by the failure to require the court to act upon it.
6. Trial of exceptions to report—The court is not required to fix a time for the trial of exceptions to a commissioner's report. Bell, &c. v. Coleman. April 28, 1885. Pendleton Cir. Ct. Opin. by Holt, J., Ct. Ap., aff. C. H. Lee, Sr., for appellants; J. T. Simon for appellee.

Replevin Bond—See Assignment, 1.

Revivor—

1. Of judgment—While a demand is necessary before a proceeding to revive a judgment, if the defendant does not raise the question by an affidavit that no demand has been made, it does not arise.

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2. Modification of judgment—An order of revivor may modify the judgment revived, therefore, as the judgment in this case bore interest at 10 per cent., it should have been so modified as to bear only 6 per cent. after the defendant's death. Apperson's Ex'or v. Farmers National Bank. April 29, 1885. Montgomery Cir. Ct. Opin. by Bowden, J., Sup. Ct., rev. J. J. Cornelison for appellant; Peters & Tyler for appellee.

Roads—

Notice—To authorize the county court to make an order closing a road public notice must be given of the intended application for the appointment of viewers to close the road, whether the applicant be a corporation or an individual. Lebanon, &c., Turnpike Co. v. Caney Creek Road. April 29, 1885. Marion Cir. Ct. Opin. by Ward, P. J., Sup. Ct., aff. H. W. Rives and John R. Thomas for appellant; John D. Fogle and S. A. Russell for appellee.

Supersedeas Bond—

1. Dismissal of appeal—The dismissal of an appeal is in substance an affirmance unless the dismissal be without prejudice to the prosecution of a subsequent appeal, and entitles the appellee to maintain an action upon the suersedeas bond.
2. The fact that the appeal was dismissed by the Superior Court when the supersedeas bond was to answer the mandate of the Court of Appeals does not affect the right of the appellee to recover upon the bond. Fearons v. Wright. April 8, 1885. Campbell Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. J. R. Hallam and E. W. Hawkins for appellant; John S. Ducker for appellee.

Sureties—

1. Action against principal—Pleading—In an action by a surety to compel the payment by his principal of the debt for which he is bound, or to obtain indemnity where the debt is not due, the petition must contain all the allegations that would be necessary if the creditor himself were suing. Harding v. Abell. April 1, 1885. Marion Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Rountree & Lisle for appellant; Russell & Avritt for appellee.
2. Same person executor and trustee—Where the same person is both executor and trustee under a will the sureties in the executorial bond are responsible until the trust fund has been separated by loaning it as such, or by the doing of some act unequivocal in its nature, unless discharged by some act of the party in interest, or by the statute of limitation. The law can not infer a payment or discharge of executorial liability, and a holding as trustee, from a willful purpose not to settle, or pay, or loan as directed by the will. Allen, &c. v. Kennedy, &c. April 22, 1885. Daviess Cir. Ct. Opin. by Ward, P. J., Sup. Ct., rev. Sweeney & Son and Stuart & Atchison for appellants; Williams & Powers for appellees.

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Taxation—

Publication of notice—Necessary allegation—Waiver—The notice required by section 2 of the act of February 17, 1866, to be given by publication in two or more daily newspapers in the city of Louisville, for the space of thirty days, that the assessment rolls of all persons assessed for taxation in said city are then open for examination and correction, is a prerequisite to the enforcement by the city of the payment of taxes, and in an action by the city to recover back taxes it is necessary to allege and prove that such notice was published in the manner required by that section, and the objection to the petition that it fails to allege that fact is not waived by a failure to except to the judgment of the court overruling a demurrer to the petition. Reamer, &c. v. City of Louisville. April 2, 1885. Lou. Ch. Ct. Opin. by Lewis, J., Ct. Ap., rev. Simrall & Bodley and Wm. Lindsay for appellants; H. M. Lane and T. L. Burnett for appellee.

Vendor and Vendee—

1. Improvements—Compensation—Where a purchaser of land by parol has, after making improvements upon the property in good faith, been refused a deed and ousted from the possession, he can recover from his vendor the consideration paid, together with the amount his improvements have enhanced the value of the land. The criterion of recovery in this branch of the case is not the cost of the improvements, but the extent of the amelioration. Kaelin v. Rufenacht. April 22, 1885. Kenton Cir. Ct. Opin. by Richards, J., Sup. Ct., rev. Carlisle, Goebel & Carlisle for appellant; J. Creutz for appellee.

2. Personal representative of vendee—Right to sue for improvements—Where a vendee has been placed in possession of land and has paid the purchase price or a part of it, or has erected improvements, and dies in possession, and the vendor subsequently elects to avoid the contract, the cause of action for the recovery of the purchase money that has been paid, or for the value of the improvements erected, vests in the personal representative of the vendee and not in his heir. Laufler, Adm'r v. Ashley. April 29, 1885. Jeff. Ct. Com. Pleas. Separate opinions by Bowden, J., and Ward, P. J., Sup. Ct., aff., Richards, J., dissenting. S. W. Railey and James Berry for appellant; Kohn & Barker for appellee.

3. Implied warranty—The doctrine of implied warranty in the sale of land has no existence in Kentucky, except in cases of partition or exchange of lands, or where there has been fraud or a material mistake.

Where the vendor, in consideration of the amount paid by the vendee, has agreed to cause a deed to be made to the vendee by third parties, and the deed is made pursuant to the contract, and the vendee placed in possession, the simple fact that he is subsequently evicted by a stranger claiming under a "superior title" can not create any implied liability on the part of the vendor to reimburse him. Elliott v. Coulter. April

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29, 1885. Casey Cir. Ct. Opin. by Richards, J., Sup. Ct., aff. Harrison & Belden for appellant; Stone & Stone for appellee.

Warranty—

What constitutes—Every statement in regard to quality or condition is not necessarily a warranty. It is so only when it is so intended. That intention is a fact and it must be alleged in order to show that the statement was not in praise and commendation, or of opinion or judgment, but as of a fact to be relied on as an inducement to the contract.

In this action by the assignee of a claim to recover of the assignor the amount paid him therefor, upon the ground that the assignor had misrepresented certain facts affecting the value of the claim, the plaintiff alleged that he relied on the statements made by the assignor, but failed to allege that the assignor intended thereby to warrant the facts to be as stated, or that he undertook or promised anything in regard thereto.

Held—That the petition is insufficient. Crawford v. Duncan. April 15, 1885. Pendleton Cir. Ct. Opin. by Bowden, J., Sup. Ct., aff. H. Clay White for appellant; John H. Barker for appellee.

Will—See Husband and Wife, 1.

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CURRENT TOPICS.

During the time Chief Justice Marshall was in the Supreme Court, 1801 to 1835, there were fifty-one decisions upon constitutional questions; in thirty-four of these the opinion was delivered by him, being twice as many opinions as were delivered on that subject by all the other members of the court together. In only one, Ogden v. Sanders, 12 Wheat., 213, of these thirty-four did the majority of the court fail to concur with him, and it has been said that time has established the correctness of his dissenting position in that case.

A novel question was tried in an Ohio court the other day. The plaintiff and defendant went out in the highway to fight by mutual agreement. In the struggle the defendant bit the left wrist and the little finger of the right hand of the plaintiff, and his bite was so severe as to make amputation of the finger necessary. The plaintiff brought this action for $5,000 damages. The judge charged the jury that if they found that plaintiff and defendant went out to fight by agreement (which was conceded) the act of each would be unlawful, and neither party could recover for injuries sustained. The jury were, therefore, compelled to find for the defendant.

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The case was then appealed and reversed, and it was held that the act being unlawful, neither party could consent to it, and the person causing an injury to another by an act which was unlawful is liable therefor. (Greenleaf, section 85; Cooley on Torts, 163; 33 Indiana, 531; 35 N. H., 503; 1 Hawks, N. C., 420; 3 Jones, N. C., 131; 1 Stew., Ala., 476; 119 Mass., 350; 2 Texas, 501; 1 Hilliard on Torts, 183; Buller's N. P., 16; Shay v. Thompson, 18 N. W. Rep., 473; 18 Am. Law Rev., 461, being a late case decided by the Supreme Court of Wisconsin.)

"Your mere nisi prius lawyer," said Burke when harassed by the technical objections of his adversaries, "Your mere nisi prius lawyer knows no more of the principles that control the affairs of State than a titmouse knows of the gestation of an elephant."

The engineer and conductor of a railroad train are not fellow servants in the sense of the rule which prevents one servant from recovering of his employer for injuries sustained through the negligence of his fellow servant. The engineer may recover of the railroad for the negligence of the conductor. (Railroad v. Ross, U. S. Sup. Ct., 1885.)

In the days of Tacitus the man among the Germans who murdered a woman was fined $2.

Jurisdiction of Justice's Court—The plaintiff having deposited with the defendant $50 as security to perform a contract which he had made for the purchase of certain land, the defendant promised to immediately return the deposit if the title should not be found good, plaintiff, having ascertained that the title was not good, declined to complete the purchase,

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and demanded a return of his deposit, which was refused. He then brought suit in a justice's court for the $50 as money had and received. Defendant pleaded a general denial. Had the justice jurisdiction, or did the case involve a question of title to land? It was held that the title to land was only incidentally or collaterally in question, and the jurisdiction of the justice was, therefore not ousted (Cal. Sup. Ct. Schroeder v. Wiltram, 1885). This question seems never to have been settled in this State. In Indiana where defendant was indicted for obstructing a highway, and he filed a general denial and gave in evidence his title to the land, Held—The jurisdiction of the justice was not ousted by the fact that title to land might come in question (Pollock v. Cummings, 38 Ind., 684). And in Vermont where suit was brought for assault and battery, and the defendant justified the assault as in defense of his freehold, Held—The jurisdiction of the justice was not arrested, and the general rule is stated to be that "jurisdiction depends upon the nature of the action, and that wherever the declaration is of such a character that under the general issue or any other plea, merely putting the plaintiff to the necessity of proving his declaration, he is bound to either prove or disprove a title to land, then the justice has no jurisdiction to try the case. But when the declaration is such as not to require the proof of title to land to sustain, and such question only comes into the case by reason of some special line of defense, then the justice is not ousted of jurisdiction to try the action. There is hardly any form of action in which the title or ownership of land may not incidentally arise, and it would be productive of infinite confusion and mischief to hold that in all actions wherever that is the case the jurisdiction ceases, and the parties are remitted to a new litigation in another forum."

Divorce Under the Romans—In Ancient Rome, under the republic divorce became more frequent with the decadence of manners. But Cæsar, Octavius, Anthony, etc., contracted marriage even three, four and five times. Indeed matters were

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so bad in Rome that it was considered an honor during her lifetime for a woman to have but one husband. A model epitaph on the grave of a Roman matron set forth that her life was "pious and exemplary, and that she had only one husband." Juvenal tells us how a lady could change her husband eight times in five years; and St. Jerome relates the spectacle could be witnessed at Rome of a woman who died, having had twenty-two husbands. The good father might have added, her last bridegroom had been divorced twenty-one times; the State paid the expenses of this curious marriage, and when the woman died she was decreed a public funeral.—Am. Law Review.

In California it has just been decided that where a telegraph company stipulates that it shall not be liable for mistakes occurring in transmitting messages, though the mistake is occasioned by the company's own negligence, unless the message is repeated, the stipulation is void and the company may be held to damages by the sender of the message (Hart v. W. U. Tel. Co., 24 Am. Law Reg., 164). In this State, in Camp v. Tel. Co., 1 Met., 164, a similar agreement was sustained and the company held not liable for the mistake, but the mistake in that case was considered as caused by atmospheric disturbances which affected the wires and which the company could not control, and not by its own negligence. This is the only telegraph case which the Kentucky Court of Appeals has ever had before it.

An architect employed to make drawings for a building, which drawings are not accepted, can not recover for his services a percentage of the estimated cost of the building, but only a reasonable compensation for the time expended in making the drawings. (Scott v. Maiied, 23 N. W. Rep., 218, Mich. Sup. Ct.)

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A recent writer on Codification, Judge Sneed, of Tennessee, says: "In my judgment one of the greatest evils under the sun is the rapid accumulation of books of reports which contain no new doctrine. Just think of it. A hundred years ago there was not a book of reports on this side of the sea. Ninety years ago there were only two. And yet that was confessedly the Augustan age of great American lawyers. Now there are between three and four thousand, and they are accumulating in this country at the rate of about a hundred every year. It was found that there were not geese enough in all the world to supply the judiciary with quills to write opinions with, and an ingenius artisan at Sheffield invented steel pens and scattered them broadcast over the world, mainly to meet the demands of the cacoethes scribendi, which, like an epidemic, had smitten the common law and equity courts of England and America." He insists further, that judges should deliver oral and not written opinions.

It appears from recent jury lists that about one-sixth of the grand and petit jurors drawn in Washington Territory are women.

Lord Bacon says: "Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. And above all things integrity is their portion and proper virtue."

KENTUCKY COURT OF APPEALS.

COMMONWEALTH, FOR, &c. v. THE BOONE CO. CT.

(Filed April 8, 1885.)

1. Statutory construction—A general statute and a local statute, subsequently passed, will both be upheld so far as they are not inconsistent with each other.

2. Erecting bridges—Discretion of county court—Mandamus—The county levy court having jurisdiction to order the erection of new bridges, and re-

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fusing even to consider an application for one, it may be compelled by mandamus either to refuse or to grant the application. But in passing on the question it has discretion, and should it refuse (even erroneously) the application, mandamus will not issue to compel it to act differently.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Holt.

Chapter 28, article 16 of the General Statutes, says that the "county courts have jurisdiction to lay and superintend the collection of the county levy, erect and keep in repair necessary public buildings, bridges, and other structures, and superintend the same." Section 29, article 1, chapter 94, provides that "if, in the opinion of the surveyor, the task of erecting or repairing a bridge or causeway be too onerous to impose on his force, he may report the case to the county court, whose duty it shall be to provide by proper means for the necessity;" while section 35 reads thus: "When a bridge or causeway shall be necessary on a road, and the expense of erecting or repairing the same is too great to impose on the precinct, the county court of the county shall have the same erected or repaired, and levy the cost thereof on the county."

The provisions supra of the general law were not repealed, either expressly or by necessary implication, as to Boone county by the act of the legislature, approved January 29, 1874, entitled "An act relating to opening and repairing roads in Boone county," or by that approved March 30, 1882, entitled "An act to amend and reduce into one all the laws relating to opening, repairing, keeping in repair, and levying and collecting taxes for the benefit of public roads in Boone county;" nor was the general law as found in chapter 94 of the General Statutes, entitled "Roads and Passways," repealed as to said county by said two acts save so far as its provisions are in conflict with them. They expressly provide that "acts in conflict" with them are repealed. It is true that the one first above named provided that the general road laws of the State should remain in force entire as to Boone county until April, 1875; but this was because the act, if ratified by a majority of the

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voters of the county at the succeeding August election (as it had to be to be operative), was not according to its provisions to be put into operation until April, 1875; when, if so ratified, it repealed the general law to the extent that it conflicted with it.

To show that this construction of the acts in question is correct but one illustration need be given. The one approved March 30, 1882, provides that the surveyor of each road precinct shall notify each person within it, "who is required by law to work upon public roads," of the time when and place where he must do so; and a penalty is provided against any person "liable to work upon public roads" who fails to comply with the notice; while the other requires that in the allotment of road districts each shall contain the same number of persons that are by law required to work on the roads; and also provides for the levy of a poll tax upon them; and yet neither act prescribes the persons who may be required to so work; and their provisions in the main are nugatory unless supplemented by the general law upon the subject so far as they do not conflict. Neither of them provides for the erection or original construction of bridges, and speak only of their repair.

The rule is well established that a statute is repealed only when a subsequent law expressly so provides, or by necessary implication; and the latter is not favored and is only effectual when they are so inconsistent with each other as to be incapable of reconciliation; and when one is local in its application, and the other is general, they will both be upheld as a consistent whole so far as they are not absolutely inconsistent.

The appellants first presented a petition to the Boone county levy court, asking it to erect a bridge, at a cost of about $5,000, over Wolfer creek, about one and a fourth miles from where it empties into the Ohio river, and upon the county road leading from Bellevue to Petersburg, a distance of about seven miles. The creek being the line between two road precincts, the petition was accompanied by the reports of the surveyors of those precincts, stating that the erection of the bridge was necessary.

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and that its construction by the two precincts would be too onerous upon them. The ground of the application was that the rise of water in the creek from freshets and the back water from the Ohio river often rendered travel over the road impossible. The court of claims refused to consider the matter. This suit was then brought to compel the levy court by mandamus to build the bridge. The demurrer to the petition and amendments to it admits as true the matters therein alleged; and when so considered they authorized the mandamus, if the county levy court had a mere plain duty to perform, which was absolutely enjoined by law, or was required to act ministerially only in a matter as to which it had no judicial discretion. The circuit court, acting doubtless upon the idea that the county court had such discretion, entered an order requiring it at a certain time to hear the matter, and make such order as it might then deem proper and expedient.

This action was proper if the belief of the court was correct as to the power of the county court, because it had refused to even hear the matter or exercise its discretion.

If an inferior tribunal has a discretion and proceeds to exercise it, then its discretion should not be controlled by mandamus; but if the subordinate public agent, whether it be invested with both judicial and ministerial functions, or only with the former, refuses to act in any way, or entertain a question as to which it has a discretion, and which the law has enjoined upon its consideration, then obedience to the law should be enforced by mandamus and the agent compelled to act, if there is no other legal remedy; but in such a case its discretion or judgment must be left free to act, and can not be controlled in a particular direction. The performance of a plain, positive duty may be compelled by mandamus, but where there is a discretion as to the result that may be arrived at, it can not be controlled. Thus if the judge of an inferior court captiously refuses to hold a court, he may be compelled to do so; and the rule applies equally to all officers, whether strictly judicial or not, if invested with a discretion. (Warren Co. Ct. v. Daniel,

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2 Bibb, 573; Ohio Co. Ct. v. Newton, 79 Ky., 267; 2 Ky. Law Rep., 306; Hull v. Supervisors, 19 John., 259; Wilson v. Same, 12 John., 414.)

Ordinarily, however, the use of the writ of mandamus is to compel an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law, and it is so defined by our Code of Practice.

In this instance the county court, in obedience to the order of the circuit judge, heard the question, and refused to order the erection of the bridge upon the ground that it was not a necessity.

It is alleged in an amended petition that the matters recited in its judgments as facts are untrue; but it is not alleged that it acted captiously or corruptly. Moreover, it appears that when the matter was heard testimony was introduced, but the appellants declined to appear or offer any, and there was no refusal of a full hearing by the county court.

The general law upon the subject being, as we have seen, unrepealed, the question then recurs, did the county court have a judicial discretion in the matter? If so, then, although mistaken in its judgment, as we must assume it was, owing to the admission, by reason of the demurrer, of the allegations of the plaintiff's pleadings, yet it can not be compelled by mandamus to act differently.

The exercise of the power to grant this writ in both England and this country has generally been confined to clear cases of ministerial duty; and the courts have refused to coerce judicial discretion. It is well settled by repeated decisions of the Supreme Court of the United States that it will not interfere to compel an inferior tribunal to do an act, either relating to the practice in it or the merits of a case as to which it has a judicial discretion, even if it has erred in the exercise of that discretion.

The unrepealed statute in this instance gave to the county court the jurisdiction to erect necessary bridges. Some one had to exercise a judgment as to their need. It is not reason-

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able to suppose that upon the mere report of a surveyor, whose powers are quite limited, the county court was compelled to act, and perform a mere ministerial duty. If so one man could bankrupt a county in the face of the opinion of the court which is especially vested with the control of county affairs; and it seems to us that section 35 of the statute supra is clearly explanatory of the question, and gives to the county court the power to erect bridges when it may deem them necessary; and that the law requires the surveyor's report in order that the attention of the court may be called to the matter and investigated by it.

It certainly is invested with a judicial discretion as to opening a road; and the reason for it applies with equal force to the erection of bridges or other county improvements, the making of which is not particularly enjoined by law. If it were a mere plain and positive duty, devoid of discretionary power, or of a ministerial character, like that requiring the trustees of a town to repair a street when out of repair, and for which they are liable to indictment in case of failure; or if it were a question between two adjoining counties as to the expediency of building a bridge over a water course between them, in which case the statute expressly authorizes the circuit court to arbitrate between them by means of the writ of mandamus, a different question from the one now presented would be before us. The action of the county court may impose a hardship upon the appellants, but both precedent and principle forbid us from interfering by mandamus with what may have been a mistaken judgment of the county court.

Judgment affirmed.

L. C. Norman and W. Lindsay for appellants.

S. W. Tolin and Warren Montfort for appellee.

WIDRIG & CO. v. NEWPORT STREET RAILWAY CO., &c.

(Filed January 8, 1885.)

1. Liability of directors—Contribution—One agreeing with the directors of a corporation that he would buy, at a heavy discount, its bonds about to be

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issued on being himself elected a director, is liable to creditors of the corporation for the profits of the transaction. A director is a trustee and can not speculate in the trust funds. (2.) A director against whom judgment has been obtained in such case by one of the creditors may have contribution from his co-directors.

2. A corporation is still liable for its debts though its property and franchises have been sold.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Pryor.

There seems to be no controversy in this case as to the liability of the corporation as first created to the appellants, in fact they are in court with a judgment and a return of no property, seeking, as the appellees insist, to make their debt out of a subsequent and distinct corporation. The Newport Street Railway Co. was chartered in the year 1864, and a majority of the stock was owned by one Robbins, who was also a director in the corporation. The corporate funds were insufficient to complete the contemplated railway, and it became necessary to raise additional means for that purpose, and with that view Robbins made an arrangement with Kellogg, Mortin & Carrick by which the latter agreed to take the bonds of the company at 60 cents or 65 cents to the dollar, and advance the money at that rate on $50,000 of the company's bonds, issued, or to be issued, under the provisions of the charter of the corporation. Certain directors of the company were to resign, Robbins among the number, and Kellogg, Mortin & Carrick were to be made directors and given control of the corporation. A deed of trust or mortgage had been executed to one Gidson on the franchises and property of the corporation to secure this bonded indebtedness. Robbins resigned and the appellees were made directors, and Robbins became the contractor to complete the enterprise. The money was advanced and the bonds distributed between these directors and sold by Carrick, who seems to have owned them all at the time of sale, some for seventy-five cents on the dollar and others at par or their full value.

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Kellogg, Carrick and Mortin were elected directors in May, 1868, and paid this money in June, July and August following. In the meantime, and perhaps subsequent to these dates, the appellants had furnished the corporation with grain, feed, etc., for the horses used on its railway to a considerable amount, and for which they obtained the judgment they are now seeking to enforce. It is immaterial for the purposes of this case whether the debt was created before or after the appellees became directors, if the appellees as directors speculated in the company's bonds and realized a profit therefrom it should be applied to the payment of appellant's debt.

It is insisted by the appellees, the company having failed to meet the payment of the interest on the bonds, that the property and franchise was sold under the mortgage to Gidson at the instance of Carrick, and the latter becoming the purchaser of the franchises and property of the road is invested with such a title as will protect the property of the road or the franchises from the claims of creditors arising or created prior to the sale and purchase by Carrick. Not only so, but that shortly after the purchase by Carrick a new and distinct organization was effected under legislative sanction, by which other parties became interested in the corporation and its property, and the old organization has in fact no existence. Without determining the effect of the new organization it is sufficient to say that the old corporation is still liable for its debts, and that the directors, when they undertook to speculate in the bonds of the corporation, were acting for the corporation, and must account to the creditor for any profits realized by them from the sale of the bonds.

Directors of a corporation will not be allowed, under an arrangement with each other, to issue the bonds of the corporation, and then purchase them at less than their value; or if the value of the bonds is in fact paid at the time, and the director then proceeds, under such an arrangement, to sell the bonds on his own private account, so as to realize a profit, he will be held to account for that profit to the creditor or stock-

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holder of the corporation. It is in fact the money of the corporation and not that of the director. It may be argued that when this arrangement was made with Robbins these appellees were not directors, still the money was not advanced until they were made directors, and it was distinctly agreed that they should be made directors before parting with their money. It has been held that a stockholder may buy up claims against his corporation at a discount and prove them up as a creditor at their par value, but a director who occupies the position of a trustee for the creditors and stockholders will not be allowed to deal with each other in such a manner. Here is a contract by which Robbins, a director, resigns, and those who are to advance the money on the bonds are elected directors, and then contract with Robbins to finish the work, applying only sixty cents to the dollar of the bonds for that purpose, and placing in their own pockets all the bonds sell for exceeding that amount.

Such a transaction will not be sustained, although the parties may have acted in the best of faith. The rights of both creditors and stockholders should be protected against such bargains, and the trustee dealing with the trust funds or contracting for those he represents will not be allowed to advance his own interest by antagonizing the interests of those he represents. There is no reason why Carrick and Mortin should not be held responsible for the profits realized from the sale of these bonds. They are the only parties to the appeal who were directors at the time, and as Carrick sold the bonds he should be held liable for the entire profits realized to the extent of paying appellant's debt, and as it is alleged and not denied that the profits on the sale of the bonds were more than sufficient to pay the appellant's claim, judgment should be entered accordingly. Carrick may bring his co-directors before the court, if he desires and require them to contribute.

The fact that the appellants appeared in the action by Gilson to enforce the trust is no bar to the recovery sought here. In that action the appellants having levied their execution on

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some realty belonging to the corporation, claimed a lien superior to that embodied in the trust deed.

There was no other question raised or issue made between the appellants and the company or the trustee, and it can constitute no bar to the recovery sought here. Judgment reversed and remanded for proceedings consistent with this opinion. As to Williamson this case is affirmed.

On a petition for a rehearing this opinion is modified so that the appellees may introduce proof as to the amount of profit realized on the bonds sold. The case is only opened to that extent, and for no other purpose.

E. W. Hawkins for appellants.

Chas. J. Helm for appellees.

WILLIAMS v. COMMONWEALTH.

(Filed April 30, 1885.)

Argument—Right to limit—A party complaining of the order of a trial court limiting the time of argument in a criminal case must, besides excepting to the order, make known to the court that more time is necessary to a fair presentation of the case.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Holt.

Upon the trial of the appellant, Mat Williams, upon a charge of felony the lower court limited the argument as shown by the following statement in the bill of exceptions:

"Counsel for defendant offered to argue the case to the jury. The court limited the argument of counsel to five minutes for defendant, and to five minutes for Commonwealth. To which ruling and limitation of argument defendant objected, and excepted at the time, and still objects and excepts.

"Thereupon the jury retired and returned the following verdict."

The testimony in the case was brief, consisting of but three witnesses for the State, and one for the defendant, and all of

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it is comprised within about four pages of the record. But two instructions were given, each containing but a few words.

The appellant says that he was in effect deprived of his constitutional right to a hearing by his counsel.

The testimony was but slightly conflicting, but this fundamental privilege is secured to one accused of crime, however clear and convincing the evidence of guilt may be, and although no testimony whatever may be offered by the defendant. However well satisfied the trial judge may be of the guilt of the accused, and however hopeless the task of argument by counsel may seem to him, yet he has no power to deprive the defendant of this right, either by entirely denying it or so limiting it as to make it a mockery. In the latter instance it would be a virtual denial of a privilege which has been properly regarded as sufficiently important to warrant its protection by constitutional provision.

It may now be regarded, however, as a settled rule that the argument of a cause may be reasonably limited; but where the liberty or life of the citizen is involved it is a power to be carefully exercised, and the appellate tribunal should see that it is not abused, because it is better to submit to an abuse of the right than to deny it, or even appear to do so. Reason and the decided weight of authority, however, say that the substantial ends of justice will be better served by giving a judge the power necessary for the protection of his court and the dispatch of business; and as the judge at nisi prius sees and hears all the incidents of a trial, and is, therefore, better qualified to judge of the need of the exercise of a discretionary power under all the circumstances than an appellate tribunal, the latter should not reverse his action unless the power has been manifestly abused. Indeed the admission that he is vested with a reasonable discretion is at the same time a denial of the right to review the reasonable exercise of it.

In Lynch v. The State, 9 Ind., 541, it is said: "But the court has a right to regulate, by reasonable rules and limita-

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tions, the argument of causes. This is a necessary discretion to be possessed by a court to prevent abuse."

The same rule has been announced in many other cases. Among them may be mentioned Ward v. Commonwealth, 3 Leigh, 743; State v. Collins, &c., 70 N. C., 241; People v. Keenan, 13 Cal., 581; White, &c. v. The People, 90 Ill., 117, and Sewell v. Commonwealth, 3 Ky. Law Rep., 86.

It would perhaps be best in capital cases that this power should never be exercised; or, if so, only under peculiar and extraordinary circumstances. A judge can not foresee the line of argument that may be pursued, or its effect upon a jury. He can not in advance measure accurately the period that may be necessary to enable counsel to present the case in the view by them deemed important, and one advocate may be so constituted mentally as to require more time to do so than another. Therefore, while from necessity the judge is invested with a discretion, yet the nature of the power demands its entire freedom from even the least abuse.

In White, &c. v. The People, supra, the charge was, as in the case now presented, larceny; and it was held that a restriction of the argument to five minutes upon a side was not a reasonable one under the circumstances and character of that case.

Whether the discretion has been properly exercised must depend upon the circumstances of each case; but as the right of argument is only valuable as it may afford an occasion to impress and influence the jury, it seems hardly possible that within the time allowed by the court in this instance that counsel, however terse, could expect to discuss the case with any hope of effect upon the determination of the issue. Indeed while allowing the largest proper liberty to the discretion of the trial court, and while it is possible that a case might be presented of such a character in its circumstances that a restriction to the extent of the one now in question might be reasonable, and not a virtual denial of the defendant's consti-

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tutional right, yet such an example would be rare, especially if it were a charge of felony, and we should hesitate to so hold.

In this instance, however, the court of its own will imposed the limit, and from the character of the evidence in the case it affirmatively appears that the restriction could not well have affected the result, which was the infliction of the lowest penalty for the offense. No motion was made by the defendant to set aside the order or to extend the time. The record shows only that an objection and exception was entered to the ruling, and there was then no statement made or claim set up that more time was necessary, or that the case could not be argued within the time allowed. For aught shown the counsel may not have intended or in fact have desired to consume in argument even one-half the time that was allowed.

In the case of Hunt v. The State of Ga., 49 Ga., 255, the counsel was limited in his argument to thirty minutes, over his protest that he could not do justice to his client's cause within that time.

In The State v. Collins, &c., supra, when the limitation was imposed the counsel for the defendant asked for more time; this also was done in White, &c. v. The People, supra, and also in The People v. Keenan, supra; and in the last two cases the counsel for the defendant, at the time of the restriction, claimed that the time allowed was wholly insufficient within which to present his client's cause; and in the last named case, when stopped by the court at the expiration of the allotted time, he moved for an extension of it.

In the case now before us there was a mere exception to the order of the court; and, in our opinion, it is a reasonable requirement of the defendant, and one shown by a review of the authorities to be justified by precedent, that he should ask further time, or at least in some way inform the judge that in his opinion injustice will be done him by the restriction, and not content himself with a mere exception.

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Judgment affirmed.

L. W. Galbraith and Thos. R. Phister for appellant.

P. W. Hardin for appellee.

STUBBINS v. MITCHELL.

(Filed May 5, 1885.)

Surety paying debt—Assigning the security to him—Surtey who pays off a debt by executing his note is entitled to an assignment of the replevin bond or other security held by the creditor, just as if he had paid in cash, and may enforce contribution against his co surety.

See same case reported in 6 Ky. Law Rep., 491, where the facts are fully stated.

Appeal from Warren Circuit Court.

Response to petition by Judge Lewis.

The payment by appellee, Mitchell, of $100 on the replevin bond, and the execution of his note to Robinson, the creditor, for the entire balance due was, in the meaning of section 9, chapter 104, General Statutes, a payment, and entitled him to an assignment of the replevin bond. And as the legal effect of the transaction was to fully satisfy the plaintiff, such assignment gave to appellee "the right to sue out or use any existing execution or otherwise control the judgment for his own benefit against the other defendants so far as to obtain satisfaction from the principal for the whole amount so paid by the surety, with interest, or from a co-surety his proper part of such payment."

There is nothing in the record showing, or tending to show, that the payment and execution of the note by appellee was not in good faith, for he became legally bound for the entire debt, and Robinson had the right to coerce from him the payment. Certainly appellant has no right to complain inasmuch as he was thereby released absolutely from the payment of one-half the replevin bond.

As appellee became, in the first instance, liable to Robinson on the note, the payment of which he alone assumed, and which Robinson might at his will have coerced, we do not per-

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ceive upon what principle of equity appellant can claim the benefit of a subsequent agreement between them, whereby, for a consideration that he did not contribute any part of, nor was in any way connected with, appellee was released in whole or part. Appellee's responsibility had been increased and his attitude had been changed by the payment of the $100 and the execution of the note, and as appellant was not jointly bound with him on the note he was not entitled to the benefit of any abatement Robinson saw proper to make, or even of a release of the entire amount.

The insolvency of the principal, Mary Stubbins, is distinctly alleged in appellee's answer, and so far from being denied is in effect admitted in appellant's reply.

Petition overruled.

B. F. Procter and Edward W. Hines for appellant.

BARBOUR, SHERIFF v. LOUISVILLE BOARD OF TRADE.

(Filed April 23, 1885.)

Constitutional law—Exclusive privileges—Exemption from taxation—The board of trade of a particular city, in disseminating commercial information and regulating business in that city, does not thereby render any public service to the State, and an act exempting it from State taxation is unconstitutional, for the reason (1) it confers an exclusive privilege not in consideration of public service, and (2) it takes the property of one citizen and gives it to another.

Judge Pryor dissents and holds the services rendered by the board of trade are of a public character, and the exempting act is not unconstitutional, and can not be so held upon the complaint of the tax-collecting officer, the State having reserved the right to repeal the exempting act and not having done so.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Hines.

On the 15th of March, 1862, the Louisville Board of Trade was incorporated. The act of incorporation contains these provisions: The corporation may hold real estate, by purchase or otherwise, not to exceed in value at any time $300,000, and may make such regulations "as may advance the commercial

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character of Louisville, fix and determine just rules and customs among its business community, acquire and disseminate useful business information, and avoid and adjust, as far as practicable, the controversies and misunderstandings which may arise between individuals engaged in trade." The act further provides that the company may authorize subscription of stock in shares not exceeding $100; that the company shall engage in no traffic, and that the legislature reserves the power to alter or amend the charter at pleasure. On the 23d of April, 1873, the charter was amended as follows: "Any real estate held by the Louisville Board of Trade in the city of Louisville, by purchase in fee simple, not exceeding 100 by 200 feet in area, and any improvements thereon, shall be, and are hereby, exempted from all State taxes, so long as said property shall be occupied by said board of trade for the purposes contemplated in its organization. And the general council of the city of Louisville is authorized to exempt such property so held and occupied from all taxes to be levied by said general council of said city of Louisville."

There was no organization under the original charter and amendment until 1879 when the company purchased real estate in Louisville, within the charter limits, and has been engaged in business since. Certificates of membership were issued and sold for $10 each that were worth, at the institution of this action, near $170; the increased value of certificates of membership coming from annual dues, income derived by the company from renting such portions of the buildings owned by it as were not used in transacting the appropriate business of the company.

The question presented on the appeal is whether the property of the board of trade is exempt from State taxation by reason of the act of 1873 quoted. This involves the inquiry as to whether that act is constitutional.

An act of the legislature may be unconstitutional because impliedly forbidden by the Constitution, or because expressly

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thereby forbidden. An act is, by implication, unconstitutional when not legislative in its nature; such as an act taking the property of one citizen and giving it to another, or an act making one a judge in his own case. Such attempted legislation is arbitrary and despotic, not in its nature legislative, the legislative department of the government being limited by its nature as the executive and judicial, their respective powers being circumscribed by the rules of Magna Charta and of the common law, constitutions generally not undertaking to define the duties and powers of either of these branches of the government. When the legislation is in terms forbidden we need look no further in order to declare it unconstitutional, but when it is not so denounced we have the more delicate task of inquiring as to the nature and limit of legislative power. We are of the opinion that the act exempting the property of appellee is unconstitutional both because it is not legislative in its nature and because expressly declared in the Constitution to be beyond the authority of the legislature.

The power of taxation grows out of the necessity to preserve the government by laying a common burden upon every citizen enjoying its protection of life, liberty and property, and is limited in its nature to objects that are public as distinguished from those that are personal or private in their character. Taxation immediately for the benefit of an individual is a contradiction in terms. The right of the legislature to contract away this attribute of sovereignty, where not forbidden by the Constitution, has been held in many of the States to exist, and has been so repeatedly held by the Supreme Court of the United States, but never by a concurrence of the entire court except where the purpose was clearly a public one.

But as the Supreme Court has the final jurisdiction to determine whether such legislation is contrary to the Constitution of the United States which forbids a State to pass any law impairing the obligation of a contract, and have held that it is, we must acquiesce unless we find that the Constitution of this State in terms forbids such legislation. Of this we will

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now inquire. The first section of the 13th article of the Constitution of this State declares: "That all freemen, when they form a social compact, are equal, and no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

A construction of this provision in a case of taxation has never arisen in this State, but it has been considered in other cases between individuals where separate or special privileges had been granted by the legislature. The first case in which the meaning of this provision arose and was decided without division was that of Gordon, &c. v. Winchester Building Association, 12 Bush, 110. At the time of the passage of the charter of the association the general law forbade, under penalty of the forfeiture of all the interest, the charging of interest at a greater rate than 10 per centum per annum. The charter authorized the association to charge more than 10 per centum, and this court declared the act unconstitutional, because it granted to the association an exclusive privilege without the consideration of public services on the part of the association. In the case of Smith v. Warden, decided January 20, 1883 (80 Ky., 609; 4 Ky. Law Rep., 553), it was held that a special act giving a clerk a longer time in which to collect his fees than was allowed by the general law as to other clerks was unconstitutional. In the latter case no provision of the Constitution is referred to, but it is expressed in the opinion that the legislation was unequal and unjust and, therefore, unconstitutional. It is insisted that some of the legislative acts declared to have been unconstitutional were so declared because they were exceptional in their character, but whether they were separate or exceptional they were equally within the constitutional prohibition. They were privileges granted without the performance of any public service while there was a general law denying the privilege to citizens in general. There is no other provision of the Constitution forbidding special, separate or exceptional legislation. This provision can not apply to political office or hereditary distinctions, because the 28th

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section of the 18th article of the Constitution provides "that the general assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer time than for a term of years."

Whatever difference of opinion there may be as to whether the first section of the 18th article of the Constitution applies in restraint of the grant of privileges as directly presented between individuals, there can be no doubt that this provision is a restriction upon the exercise of the taxing power. It is certainly a "public privilege" to be exempt from taxation. The exercise of such power is purely an act of sovereignty. Independently of any constitutional provision the surrender of such an element of sovereignty is never to be presumed. Every intendment is against it so strongly that a reasonable doubt of the legislative intention to surrender or limit must be solved against such intention. Uniformity and equality of taxation is of the essence of the power, and an exemption in one case is the increase of the burden of taxation upon others not thus favored. The apparent conflict in the application of this doctrine between the several State and Federal courts has arisen from the different views of the courts as to what constituted a "public purpose," and that inquiry arises here: Is the exemption claimed in consideration of a public service and for a public benefit? When it is conceded that the company is required to perform a public service within the meaning of this provision of the Constitution it must also be conceded that the legislature are the exclusive judges as to what amount of public service will justify the grant; but they can not be the judge as to whether there are public services to be performed; for, in such case, they would be permitted to nullify the provision of the Constitution. When any department of the government is constituted the sole judge of its own powers there is no longer a constitutional limitation of powers.

It will be seen from the charter of appellee, already quoted, that no public duties or services are prescribed as a considera-

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tion for the grant of exemption from taxation. The only limitation upon the exemption is that it shall cease when the company no longer uses the property for the purposes provided in the charter. The Constitution provides that the grant of an exclusive or separate privilege must be supported by the "consideration of public service." That consideration must be either past, present or future. There is no pretense of a past or present consideration. If it is future it must be prescribed in the act of incorporation. We find no duties prescribed there that could support a contract. The powers granted are mere gratuities, to be exercised at the pleasure of the company, and if they were imperative they are not public in their nature. The gathering and dissemination of commercial information and the making and enforcing rules for the conduct of business men in the city of Louisville may be incidentally beneficial to the city as well as to the State at large, but those things are not public duties or public services within the meaning of the Constitution. The company makes its own rules which appear to be primarily for its benefit. Its own members derive the profits and enjoy the privileges and benefits resulting directly from the association. To the public there is only an incidental advantage that would necessarily flow from such an enterprise instituted without legislative aid. By an amendment to the charter of this company in May, 1880, they were given the power to define the duties of the Louisville flour inspectors and to fix their fees. This amendment imposes no duty upon appellee, it is a mere grant of a privilege that may or may not be exercised, and even if exercised would not be the performance of a public service. Appellee may perform a service that is directly beneficial to the local public of the city of Louisville, but the existence of such benefit would not authorize a tax upon all the people of the Commonwealth to foster such an enterprise. The exemption of this corporation from State taxation is a tax, to that extent, upon every citizen of the Commonwealth, as every other citizen must help to bear the burden thus lifted from the corporation.

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As a general rule the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the State to be paid to this corporation to forward the objects stated in their charter would be declared at first blush unconstitutional; and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual it would strike anyone as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one there is unquestionably the power to exempt the other. It is not every enterprise that is incidentally beneficial to the public that will authorize the State to foster it at the expense of the people at large. The object must appear upon the face of the legislation to be directly for the public good and of such a character as to call for the aid of the State to forward it in the exercise of a governmental function. The building up in Louisville of any extensive manufactories would be of an incidental benefit to the people of the whole State, but no one would suppose for a moment that the whole State should contribute to it. Every citizen is entitled to equal rights and equal privileges with every other citizen. In entering into the social compact called government he stipulates to bear only his proportion of the common burden of taxation, and when more is imposed upon him his property is taken against his consent and without consideration—it is spoliation. The exemption of charitable institutions and schools has always been recognized as valid because done in the exercise of a governmental function, but private undertakings, primarily for private gain or aggrandisement in any way, can not be protected individually and specifically by the government, but must come under general laws that operate alike upon all.

We are of the opinion that the act of exemption is unconstitutional and the judgment is reversed and cause remanded, with directions to dismiss the petition and dissolve the injunction.

Judge Pryor dissenting.

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Judge Pryor delivered the following dissenting opinion:

The appellant, John D. Barbour, as sheriff of the county of Jefferson, reported to George H. Webb, clerk of the Jefferson County Court, that the assessor of the county had omitted to assess the real estate and improvements belonging to the board of trade, situated on the southwest corner of Third and Main streets in the city of Louisville, for the years 1880, 1881, 1882 and 1883. The property was then assessed as provided by the statute for those years, the amount of taxes being $1,860, and thereupon the sheriff undertook, after tendering to the president of the board a receipt for the taxes, to levy on the chairs, desks and tables of the corporation, to satisfy the claim of the State.

An injunction was obtained by the corporation against any action by the sheriff on the ground that by a provision of its charter the property of the corporation was exempt from the payment of all State taxes.

A demurrer was entered by the defense and a motion made to dissolve the injunction on the face of the petition. The facts, therefore, alleged in the petition must be regarded as true.

The chancellor overruled the demurrer and also the motion to dissolve the injunction, and upon the failure of the defense to plead to the action a judgment was entered perpetuating the injunction. On the hearing of this case counsel for the corporation insisted that the manner of the assessment was illegal, and, therefore, the judgment below was proper, but without considering that branch of the case I will proceed to determine the real question raised by the State through its collecting officer, and that is as to the constitutionality of the exemption.

It is maintained by counsel for the sheriff that the legislature had no power, admitting the facts alleged in the petition for an injunction to be true, to grant to the corporation immunity from taxation.

The importance of the question involved necessitates an inquiry into the character and business of this corporation and

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the consideration influencing the legislature to exempt its property from the payment of State taxes. Before, however, proceeding to such an inquiry, it is proper to determine the extent of the power of the legislature under the Constitution to make such exemptions. The right of the State to exempt from taxation the property of charitable, religious and educational institutions has never been questioned, and having the right, says Mr. Justice Cooley, to cause taxes to be levied from motives of charity or gratitude, so for like reasons it may exempt the objects of charity and gratitude from taxation. The immunity in this case arises from no such motive as would justify the exemption of mere benevolent institutions, and unless this provision of the appellee's charter is sustained upon the theory that some equivalent has been given the State for the surrender of the right to tax the corporate property, then this judgment should be reversed.

This court has in effect adjudged that the consideration requisite to maintain such a contract between the corporation or the citizen, on the one hand, and the State, on the other, for the surrender of the exercise of this sovereign right is the consideration of public service or that character of service conducive to the public good. It was so held in the case of Sutton's Heirs v. The City of Louisville, 5 Dana, 28, and in the case of the City of Lexington v. McQuillan's Heirs, 9 Dana, 513. Was there such a consideration for the grant in this case is the only question involved.

Where there is a common burden to be borne by common contribution in the way of taxation it is the universal doctrine that each and every citizen must bear his share of that burden, and payment may be coerced by the seizure and sale of his property except in cases where there is a valid statutory exemption. This corporation, known as the board of trade, was created by an act of the legislature approved March 16, 1862, and by the terms of its charter it was authorized to hold and receive property not to exceed in value $300,000.

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It is alleged in the petition, and appears from the face of the charter, that the prime object of the association is "to make such rules, regulations and by-laws as will advance the commercial character of the city of Louisville, fix and determine the rules and customs among the business community, acquire and disseminate business information, and avoid and adjust as far as practicable the controversies that might arise between those engaged in trade."

Those who desired to promote the objects of the organization were authorized to do so, by becoming stockholders or the owners of shares in the enterprise. It is also provided that this board of trade "shall not engage in traffic of any kind or exercise any banking privileges, and the legislature shall have power to repeal, alter or amend this charter at any time." It is further alleged that as the corporation was prohibited from engaging in any business, and having no income to pay taxes and other expenses, that efforts to procure stock proved unavailing until they applied to the legislature of the State in 1873, asking exemption from taxation to enable them to succeed in this public enterprise. An act of the legislature was then passed to the effect "that any real estate held by the board of trade in the city of Louisville by purchase in fee simple, not exceeding 100 by 200 feet in area, and any improvements thereon shall be, and are hereby, exempt from all State taxes so long as said property shall be occupied by said board of trade for the purposes contemplated in its organization, and the general council of the city of Louisville by the same enactment was empowered to exempt the property from the payment of city taxes. An organization was then effected, based on the rights and privileges conferred by the grant, and stock subscribed exceeding in amount $100,000. The general council of the city made the exemption as authorized by the act, and a purchase was made by the board of the Lithgow building at the price of $100,000, secured by mortgage. The property purchased did not exceed 100 by 200 feet in area, and since the purchase the corporation has used and occupied the building

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for the purposes contemplated in its organization. It appears that its official reports are distributed each year to the public for information.

It has in its employ a large number of clerks and employes, whose business it is to prepare in tabulated form and furnish daily for publication throughout the country the statistics of over 160 classes of produce, and that this information is the principal basis of the mercantile and trade calculations with respect to this produce in the United States. It also appears that since its organization and the act of exemption (the fact being alleged) by an act of the legislature it has the supervision of and is made the inspector and register of all grain that passes through the public warehouses of the city. It is also made the inspector of flour and other provisions, and furnishes for public information the statistics of all the movement of freights on the railroads leading to and from the city. This seems to be the sole business of this organization, and the expenditures made and services performed by the corporation (unlike other private corporations) must have had primarily in view the commercial prosperity of the city and State, realizing only those incidental advantages that all business men have from the results of the gratuitous labor and expense of the association. An investment has been made by a private corporation for a public purpose, to which they have pledged their money and credit without receiving any greater consideration than the mere rise in value of the property and the income from some store rooms under the main building that is applied to the expenses of the enterprise and the payment of the bonded debt. Since the purchase of the property, as was conceded at the hearing and shown by exhibits filed, the property has risen in value and an income derived from stores under the main building that has caused a large increase in the value of the stock, still a large portion of the bonded debt remains unpaid, and if satisfied in full the chancellor has no power for that reason to sanction the act of the sheriff in

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seizing the corporate property in the face of this legislative exemption.

While the legislature has neither the unlimited power to tax nor the unlimited power to exempt property from taxation, that department of the State government is the sole judge of that which is necessary for the public good, and the courts should not attempt to control it.

It is insisted that by the terms of the charter there is no obligation on the appellee to discharge any public duty, and that such a grant is in violation of section 1 of the Bill of Rights, declaring "that all freemen when they form a social compact are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services."

It was held in the case of Williams v. Cammack, 27 Mississippi, 209, that a similar clause in the constitution of that State "was directed against superiority of personal and political rights, and a denial of all title to individual privileges, honors and distinctions from the community, but for public services."

This court has differed as to the meaning of this provision of the Bill of Rights in determining the constitutionality of State legislation, but we all doubtless concur that sound policy requires uniformity and equality in taxation as near as may be practicable, and that those desiring the protection to person and property from the State government must bear their proportion of the burden. This doctrine is fundamental, as has been held by the courts of every State in the Union.

The purposes of this corporation are clearly set forth in its charter, and the exemption based on the consideration that the object in view will be attained, "and so long as the property is occupied by the board of trade for the purposes contemplated in its organization the property is exempt from State taxation." It is distinctly alleged that these public duties have been performed and were being discharged when this levy was made upon the corporate property.

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It can not be maintained from the provisions of the charter, or the legislation in reference to it that the primary object of the organization was to advance the private interests of those connected with it. A few public-spirited citizens have devoted the use of this private property to the public good, reaping only the incidental benefits that must necessarily accrue to the entire commercial world.

The corporation can engage in no business or traffic, and the legislature seeing, as this court must presume, the public benefits resulting from the organization, has, since the date of the exemption by special enactments accepted by the corporation, imposed upon it the discharge of public duties that otherwise belonged to the municipal government of the city in which this property is located. The legislature and the general council of the city of Louisville have each made this exemption in consideration of the public benefits derived from the organization, and while the mere incidental advantage arising to the public from the promotion of private interests will not authorize this character of legislation, when private property or its use is devoted to the public in the manner alleged in the petition of the appellee and evidenced by its charter, an exemption from taxation based on such a consideration should be upheld.

Mr. Cooley, in his work on Constitutional Limitations, says: "But what is for the public good, and what are public purposes, and what does properly constitute a burden, are questions which the legislature must decide on its own judgment, and in respect to which it is vested with a large discretion which can not be controlled by the courts, except, perhaps, where its action is clearly evasive, and where under a pretense of a lawful authority it has assumed to exercise one that is unlawful." (Cooley's Cons. Limitations, page 155, 5th edition.)

The cases cited by counsel for the appellant have but little, if any, analogy to the case before us. In the case of Lowell v. City of Boston, 111 Mass., 454, a tax was levied to rebuild the houses of citizens that had been destroyed by fire, and the

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court very properly held that the tax was not levied for a public purpose, but was taking, by means of taxation, the money of A to rebuild the property of B.

In the case of the Brewer Brick Co. v. Brewer, 62 Maine, 62, the plaintiffs, citizens of the town of Brewer, claimed that its property was exempt from taxation by reason of the by-laws of the town exempting manufacturing establishments from such burdens. It was held that neither the town nor the legislature was vested with such a power. That was a case of the exemption of private property from its share of the burden, and if the legislature of this State had exempted from taxation the large business house of one of the merchants connected with the present corporation, by reason of the incidental benefits the city of Louisville received from his individual enterprise, it would be analogous to the cases cited by counsel and open to constitutional objection.

In the case of Gordon v. The Winchester Building Association, 12 Bush, 110, the corporation was invested with the power to loan its money at a greater rate of interest than the other banks of the State or the private citizen, and than was allowed by the general law. There was no consideration expressed or given for this privilege, and such partial legislation in favor of one to the exclusion of others who are necessarily to be affected by it can not be sustained.

In that case a special privilege was granted the association with no other consideration than its purpose to loan money and compel the borrower to pay a rate of interest that would have been usurious if borrowed from any other corporation or individual.

It was a discrimination in favor of one to the exclusion of all others.

Taxation may be imposed for other than mere governmental purposes, and where the sovereign power can impose the tax it certainly has the right, by contract based upon a consideration for the public good, to relieve property from a burden for which it would otherwise be liable, and the fact that the con-

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tract is with a private corporation can make no difference, and the presumption is always in favor of the validity of the grant. (State Bank of Ohio v. Knoop, 16 Howard, 369.)

Mr. Justice Black, in the case of Sharpless v. The Mayor of Philadelphia, 21 Penn., 147, delivering the opinion of the court, said: "It is a grave error to suppose that the duty of a State stops with the establishment of those institutions which are necessary to the existence of government, such as those for the administration of justice, the preservation of peace, and the protection of the country from foreign enemies. Schools, colleges and institutions for the promotion of the arts and sciences which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage and stimulate commerce, domestic and foreign, is a duty of the sovereign as plain and as universally recognized as any other." We think it can not be doubted (if such was the true test, which I deny) but that the legislature could have empowered the city of Louisville to have imposed a tax for the purchase of a building to be devoted to the same use and conducted at the expense of the city.

It was on the faith of the grant that the individual members of this corporation invested their money in the property sought to be taxed, based upon a contract with the State, as binding as if made between two of its citizens.

Nor is the State now complaining. The act exempting this property remains on the statute book unrepealed, and the tax is now attempted to be coerced upon no other ground than that, in the opinion of the collecting officer, the exemption is in violation of the Constitution.

The right to repeal or modify the charter is expressly reserved by the terms of the grant, and still neither a legislative repeal nor a modification of the act of exemption has, so far as appears from the record, ever been attempted, but, on the contrary, the legislative branch of the State government, in-

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stead of repealing this exemption, has been gradually imposing on the corporation the exercise of public duties.

It is not alleged in the pleadings or maintained in the argument that the corporation has been adding to the value of the corporate property with a view of avoiding taxation.

No such question is before us, and when a court of equity undertakes to deprive the legislature of the right to exercise its discretion as to what constitutes the public welfare, it is an assumption of power that does not belong to the judicial tribunals of the State.

The legislative power to make such exemptions has been sustained by this court in Johnson v. Commonwealth, 7 Dana, 338; Farmers Bank v. Commonwealth, 6 Bush, 127; City of Louisville v. Commonwealth, 1 Duvall, 295; E. & P. Railroad v. Trustees, 12 Bush, —; Keith v. Hamilton, 5 Bush, 458; Commonwealth v. Owensboro Railroad, 5 Ky. Law Rep., 650.

For these reasons I must dissent from the views expressed in the principal opinion.

Russell & Helm for appellant.

Brown & Davie for appellee.

L. & N. R. R. Co. v. WILLIS.

(Filed May 7, 1885.)

Railroad—Injury to infant—Right of father to sue—A railroad employing a minor to act as brakeman, or in any other dangerous capacity, without the knowledge or consent of his father assumes all risks incident to such service, and is liable to the father for injuries sustained by the boy in the course of the employment, though occasioned by the boy's own negligence or unskillfulness.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Holt.

The appellee, W. J. Willis, recovered a judgment in the lower court for $500 for trouble and expense in caring for his son and the loss of his service, arising from an injury to him while engaged in coupling the cars of the appellant.

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The father bases his right to recover upon the fact that his son was under age; and that the appellant, without his knowledge or consent, employed and permitted the son to render service for it in the hazardous capacity of brakeman.

The answer denies the allegations of the petition and alleges affirmatively, among other matters, that the injury resulted solely from the son's negligence.

If this statement were material, yet it is denied, because the order filing the answer recites, that by consent its affirmative statements are traversed.

It appears that the son had, prior to the date of the injury, been in the employ of the appellant for wages, but had been discharged; and that when the injury was received he was voluntarily acting as brakeman by the request or at the instance of the conductor in charge of the train.

It consisted of sixteen cars, and had but one brakeman beside the son upon it, although, according to the testimony, at least three were necessary or usual, and although the conductor testifies that he did not know when or where the son boarded the train, yet it is quite evident that he, as appellant's general agent for all purposes relating to the running of it, knew long before the accident occurred that the son was rendering the appellant service as brakeman, and in fact the conductor was giving directions to him as such, and as to the very work he was doing when the accident occurred.

It is not necessary that he should have been employed for wages when the injury was received in order that the father may recover. If he was then rendering service for the appellant by the request or direction of its general agent as to the business in hand, and which was certainly of a character dangerous to life and limb, then, being under age, it was a wrongful interference with the right of the appellee to control him.

The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him by the general agent of the appellant, at war with the father's rights.

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The appellant can not shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to it before it took control of him.

The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him or create the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable at least for any injury that was likely to result from such illegal conduct. If one engages the servant of another in an obviously dangerous business, he renders himself responsible for any injury the servant may sustain while so engaged, and which can rationally be attributed to the undertaking; and this is so, even if the injury results immediately from the neglect or unskillfulness of the servant, owing to the fact that the person by so illegally interfering assumes all the risk incident to the service.

The instructions in the case conform to this rule. The lower court in saying in the first instruction that if the son was "employed," etc., must be understood as meaning simply that if the son was then rendering service for the appellant, and not that he must have been engaged at the time under a contract for wages; and there is, therefore, no conflict between the evidence and the instruction, and it does not seem to us to assume, as counsel claim, that the conductor had the authority from the appellant to employ the son.

Judgment affirmed.

L. A. Weakley and Wm. Lindsay for appellant.

L. C. Willis for appellee.

MATTHEWS v. ALBRITTEN.

(Filed December 2, 1884.)

Resulting trusts—Rights of creditors—Where the purchase price of land is paid by A, but the land is conveyed to B for the purpose of defrauding A's.

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creditors, they may subject it to the payment of their debts; and it is immaterial whether the debts were created before or after the making of the deed. General Statutes, chapter 18, forbidding resulting trusts in such cases applies only to parties to the transaction and not to creditors.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action to subject real property, the legal title of which is in appellee, J. E. Albritten, to the satisfaction of a judgment against appellee, R. T. Albritten, upon which an execution was issued and returned no property found.

It is stated substantially in the original and amended petitions that the property in question was bid for and purchased at a public sale by J. E. Albritten, who received a deed therefor, but that the purchase price was actually paid by R. T. Albritten; that the conveyance was without any consideration from the former, but under an agreement between them it was made to him, and he has ever since the sale held the property in secret trust for the use of the latter, who is the real and beneficial owner.

The question presented by the appeal is whether the statements contained in the original and amended petitions being taken as true, the property is subject to the payment of appellant's debt, which was created since the execution of the deed to J. E. Albritten. And the determination of that question depends upon the proper meaning and application of section 19, article 1, chapter 18, General Statutes, which is as follows: "When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter; but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or when the grantee, in violation of some trust, shall have purchased the land deeded with the effects of another."

Before the adoption of the Revised Statutes, which contained a provision the same as the section quoted, when a deed was

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made conveying real property to one person, the consideration therefor being paid by another, a trust resulted in favor of the latter which he might enforce, although the deed was so made in pursuance of an agreement between them. And then of course there was no question of the right of creditors by proper proceedings to subject the property thus held to the payment of debts of the cestui que trust, whether existing at the time or created subsequent to the deed. Now, however, no use or trust results except in the two cases mentioned in section 19. And the question arises whether the change of the law was intended to apply to and affect the rights of creditors as they previously existed, or to be restricted in its application to the parties to the transaction.

The reason for the change, so far as the parties themselves are concerned, is apparent. For generally the object and effect of an agreement, whereby the legal title to real property is vested in one party, while the consideration is paid by another, is to defraud creditors and purchasers, hence it is now declared not to be the policy of the law to uphold and enforce a secret trust in favor of a person paying the consideration who voluntarily consents for the legal title to be in another. But there is no reason why a creditor should be denied relief in equity whenever property for which his debtor has paid the consideration, and of which he has the actual use and benefit, is by a fraudulent arrangement placed beyond the reach of legal process. And unless the intention of the legislature to extend the application of section 19 to creditors, and thus take from them a remedy they once undoubtedly had, it should not be done.

By section 20 it is provided in express terms that such deeds shall be deemed fraudulent as against existing debts and liabilities. But it does not necessarily follow that the legislature intended thereby to sanction such transactions as against debts and liabilities of the cestui que trust subsequently created. For if it be made to appear at any time that real property for which a party has paid the consideration is in fact held in

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secret trust for his use, and that he does have the use and enjoyment of it, there is no reason why it should not be made subject to his debts and liabilities though created subsequent to the deed under which it is held. If fraudulent in the beginning as to existing debts and liabilities, the transaction continues fraudulent so long as the property is held in the same manner and for the same purpose.

It is not in terms provided in section 19, nor can it be fairly implied that the legislature intended to deprive the creditor of the right to subject property thus held, and, in our opinion, upon the statement of facts alleged by appellant, he was entitled to the relief sought, and the court erred in sustaining the demurrer to the original and amended petitions.

Wherefore, the judgment is reversed and cause remanded.

D. G. Park for appellant.

W. W. Robertson for appellee.

GAYLE, &c. v. OWEN COUNTY COURT.

(Filed May 7, 1885.)

1. Liquor license—Discretion of county judge—It is entirely within the discretion of the county judge to grant or to refuse a license to sell liquor, and an injunction should not issue to restrain him from refusing the license.

2. Constitutional law—Subject-matter embraced in title of act—An act, entitled "An act to authorize the vote to be taken on the proposition to sell spirituous liquors," a provision fixing a penalty for druggists violating the act is not foreign to the title.

3. Constitutional and unconstitutional provisions of act—Where the several provisions of an act are separable the fact that one is unconstitutional does not invalidate the entire act.

4. Voters on local option—The act was not unconstitutional because it allowed districts that had previously adopted "local option" to vote on the question.

5. Mode of taking vote—Variance in the form of putting the question to the voter from that prescribed in the act did not invalidate the election.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor.

By an act of the legislature, approved May 9, 1884, the voters of the county of Owen were authorized to vote at the

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ensuing August election on the proposition "as to whether or not spirituous, vinous, or malt liquors, or any mixture thereof, may be sold in Owen county as a beverage."

The officers of the election were required to propound to each voter who might vote the question "are you in favor of the sale of spirituous, vinous and malt liquors in Owen county as a beverage," and when the vote is cast to record it for or against the proposition so as to express the will of the voter on the question.

The election seems to have been conducted as required by the provisions of the act resulting in a majority vote against the sale of liquor as a beverage.

The appellants, several in number, who were hotel keepers in the county at the time the vote was taken and engaged in retailing spirituous, vinous and malt liquors, made or (some of them) application to renew their tavern license with the privilege of selling ardent spirits. The county judge refused to grant the license, and from this refusal the appellants have resorted to a court of equity, alleging that the county judge refused to renew the license in anticipation of the vote about to be taken under the act, believing that a majority of those within the particular locality were in favor of the law and opposed to the sale of liquor as a beverage, or that a majority in the county would favor prohibition; that the county judge had no other reason for denying the several applications and by reason of such action on his part and the additional reason that the act was unconstitutional, if enforced would work irreparable injury in reducing the value of their property and destroying their business. They applied to the chanceller for an injunction, enjoining the clerk and judge of the county court from spreading on the records of the court the result of the vote, which, when made of record by the provisions of the act, was to be evidence that all proceedings under it were properly and regularly had. An injunction was granted, and by an amended petition a mandamus was asked for directing the judge and clerk to refrain from exercising this ministerial

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duty. No objection was taken below to the manner in which the action was instituted, or the question raised as to the right of the several hotel keepers, who, if wronged, had each an independent cause of action to unite as plaintiffs and present in the one action their several complaints, and, therefore, it is unnecessary to determine this question.

The act has been assailed upon the ground that it is in violation of the Constitution, and the decision of that question determines the right of the appellants to the relief sought. If the act is constitutional, and their application heard by a tribunal having the sole jurisdiction to pass on the facts, there can be no equity in their petition. In such a case the influences operating on the mind of the judge in the decision of the case, either for or against the parties, are not the subjects of investigation by the chancellor, nor would he interpose by injunction to restrain the action of the county judge, however erroneous his decision might have been on the merits of the application. The resort to a mandamus was the proper remedy to prevent the entry of the vote upon record if the act was unconstitutional, and whether an injunction could be resorted to as another and distinct remedy is not material to decide.

In the matter of license to keep a hotel or to retail spirituous liquors the judge of the county court has a large discretionary power, and while this discretion is judicial the chancellor will not control its exercise or prohibit the inferior court from acting when the case is within its jurisdiction.

The judge, from his own knowledge, may suspend or arrest the exercise of such a privilege when conferred. No one is presumed to know more of the wants of the people he represents than the judge of the county court, and certainly no one more interested in elevating their moral and social condition, still if the act is unconstitutional it should not be made the ground for refusing future applications, and as the case is here, and that question fully discussed, it is proper to pass on the constitutionality of the act.

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The title of the act "authorizes the vote to be taken on the proposition to sell spirituous liquors as a beverage," and it is argued because some of the provisions of the act prescribe new rules of evidence for punishing those who violate its provisions, and fix a penalty against druggists, that such subjects are foreign to the title and have no direct connection with it.

In Philips v. Covington Bridge Co., and in many other cases, this court has said "that none of the provisions of a statute should be regarded as unconstitutional when they all relate directly to the same subject, have a natural connection and are not foreign to the subject expressed in the title." There is no provision of the act but what has a direct connection with the subject-matter of the title. The law enacted is to prohibit the sale of spiritous liquors in the county of Owen, and to be enforced when a majority of those voting favor the proposition. It is declared an offense to sell, and the penalty is imposed; the law is declared; the punishment is fixed and the remedy given; all having a direct connection with the title of the act, and without such provision the law would be incomplete. That it provides the manner in which druggists shall sell or physicians prescribe it is not foreign to the title, but embraced by it and has a material connection with it. The fact that when the selling is at a meeting or gathering of people, the law conclusively presumes that those in charge of the meeting furnished the liquor is of doubtful constitutionality, still this will not prevent the punishment under the ordinary rules of evidence, and if the objectionable feature is erased from the act leaves it a complete law, and so of the question made under the 8th section.

The fact that some one or more provisions of an act are unconstitutional does not invalidate so much of the act as is not open to constitutional objection, when, if the objectionable features are stricken out the law can be enforced, or is still a complete law. The second ground of objection is that the election was not free and equal, because some of the county districts in the county had already voted local option, and were

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not to be affected by the result; that if a majority voted against the law local option still prevailed in those districts. This was a mere question of legislative policy to be determined by the legislature and not the courts. By legislative enactment it had been provided that certain districts should sell whisky and that right denied or not given to other districts in the same county, and it might as well be maintained that it was unconstitutional to give one part of the county the right to sell and deny the right to the other, as to say that the legislature had no power to leave this question in the same condition it was when the law was passed, in the event its provisions were rejected by a majority vote.

The same rules do not govern this character of elections or prevail that must be followed in the election of officers under the Constitution; in fact the voters are not enacting the law, but the legislature, and as a matter of favor to the people or the voters the legislature has in effect provided that it shall not become operative until a majority vote approve it. In consulting the wishes of the people no voice should have been silenced, as all were directly interested in the result; those in favor of the retail of whisky in the local option district were permitted to vote as well as those opposed to it. (Commonwealth v. Weller, 14 Bush, 218.)

The legislature has consulted the will of each and every person who can receive its benefits, and who was a legal voter under the Constitution, and in Marshall v. Donovan, 10 Bush, 681, those were allowed to vote who had no such constitutional right, but upon whom the burden of taxation rested, and, therefore, should receive the benefits.

The legislature has selected the agencies in this case to determine the final effect of the statute, and this right or power in the legislature has been too long conceded to be now regarded as an open question.

It is further insisted that the voters were not asked, when voting, the proper question. Some were asked the question: "Are you for whisky or against it?" and others, "How do you

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vote on the whisky question?" while the act required them to be asked "Are you in favor of the sale of spirituous, vinous and malt liquors in Owen county as a beverage?" There is no fraud alleged or any fact showing that the voters were deceived or in ignorance of the provisions of the act in regard to which they were voting, nor would such an irregularity have invalidated the election. The order for the election had been entered on the order book of the county by the county judge, and the same published for weeks before the election. An intelligent people must be presumed to have known what they were voting for, and, besides, the questions propounded were as much prejudicial to the one side as the other, and that a majority voted for the measure is not controverted.

It results, therefore, that the judgment denying the mandamus and dissolving the injunction was proper, and is, therefore, affirmed.

W. Montfort and O. B. Hallam for appellants.

Thos. R. Gordon and Joseph Blackwell for appellees.

KENTUCKY BAR ASSOCIATION.

The next meeting of the State Bar Association will be held at Crab Orchard Springs July 8 and 9. The executive committee have already received assurances from a number of lawyers from different parts of the State of their intention to be present. The programme has not yet been completed, but parts of it have been decided on. There will be an address by the president, Judge Wm. Lindsay, and papers read by Messrs. Malcolm Yeaman, of Henderson, Thos. Speed and C. B. Seymour, of Louisville, and others not yet announced. Among the questions for discussion are the following:

1st. Should there be any changes made in the law of jury trials?

2d. Which is the better theory of the property rights growing out of the marriage relation, that of the civil or of the common law?

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3d. What is contempt, and should there be any further legislation on that subject?

4th. Should there be a revision of the General Statutes?

The report of the last annual meeting is now being prepared and will be ready for delivery in a short time. Further details of the coming meeting will also be announced in a few days by circular from the committee. Arrangements have been made for reduced rates on all the railroads and at the hotel.

NEW BOOKS.

Estee's Pleading, Practice and Forms adapted to actions under the State Codes of Procedure. By M. M. Estee. 3d edition revised and enlarged by Carter P. Pomeroy. 3 vols. A. L. Bancroft & Co., San Francisco, Cal., 1885.

The first edition of this work was issued in 1869, and this is the third edition edited by Mr. Pomeroy, editor of the West Coast Reporter. It is essentially a practitioner's book, aiming to digest and arrange in an order covenient for ready reference the cases on the subject of Pleading and Practice under the Codes. The writer commences with the first inquiry made by the practitioner, and advances with him step by step to final judgment or disposition of the case on appeal. The text is illustrated by forms suitable to almost every conceivable action from the common count, for money had and received, to the equitable action for specific performance. These forms are specially adapted to the practice in the three Pacific States, California, Nevada and Oregon, but as the Codes in all the States are very similar it is promised that the forms shall be found useful in every Code State.

The Theory and Principles of Law. By Sydney K. Smith (formerly of the Louisville), now of the St. Louis Bar. Herald Print, Columbia, Mo., 1884. $3.

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This little volume seems to be an abridgement of Blackstone's Commentaries. We have examined several chapters and find the statements clear and accurate. This field has, however, already been well worked, and we do not exactly know the raison d'etre of this work unless it be for use in the larger colleges where the senior classes might acquire through it means that general acquaintance with the law which Blackstone so eloquently argues all educated men (laymen not less than lawyers) should possess.

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INDEX TO VOLUME VI.

ACCOMPLICE—See Gaming, 3, 4— PAGE.
1. whose testimony is corroborated, jury determine its weight and credibility 368
ACCOUNTS—
1. the fact that they are confused and complicated does not give jurisdiction to equity 443
2. refusal to transfer accounts to equity which had been carefully examined at law 598
ACKNOWLEDGMENT—
1. married woman's deed not recorded in eight months from its date, effect of under Rev. Stats. 10, 447
2. of married woman can't be invalidated by proving *alibi* 301
ADMINISTRATORS—See Personal Representatives.
ADMISSIONS—
1. one whose name is forged, effect of his admission of genuineness of the signature 72
ADOPTION—
1. right of Chinaman to adopt an American child 675
ADVANCEMENTS—
1. land conveyed by father during his life-time upon special conditions is not to be charged as an advancement 47
ADVANCES—
1. to A. to buy goods to be shipped for sale, liability of goods for other debts of A. 587
ADVERSE POSSESSION—
1. possession of one of several joint owners is not adverse to the others. 439
2. of land for 15 years gives title, though claimant can't trace back to Commonwealth 584
3. may be set up against one claiming under patent from the Commonwealth 594
4. one entering on land under executory contract of purchase, when does his possession become adverse 702
5. possession may be adverse under Stat. of Limitations while not so under Champerty Act 707
6. Taking possession of land under parol gift 365
AGENCY—
1. agent abandoning his principal's property (a horse) one buying it, knowing the facts, acquires no title 509
2. sister entrusting her affairs entirely to her brother, her receipt to him is not conclusive 584
3. agent, though violating his instructions in making sale, passed title to purchaser 651
4. declarations of agent as to past transactions to which he was not a party do not bind his principal 658
5. one who buys as agent for another mistakenly, thinking he has authority to do so, is personally liable 77

Digitized by Google

ALIENATION OF ESTATES— PAGE.
1. right to vest absolute estate in one in fee or for life and withhold powers of alienation 381
2. constructions favorable to non-alienation not adopted 362
ALIMONY—
1. *pendente lite*, what evidence is to be heard in fixing 216, 288
2. right to, *pendente lite*, though wife had been previously divorced . 216
3. wife can never have judgment vs. husband for her costs 439
4. facts to be considered in fixing attorney's fee 439
5. attorney may compel judgement of fee summarily 439
6. husband worth $1,000 but crippled and helpless, $350 alimony allowed 661
ALLEYS—See Street Improvements, 3—
1. effect of mere recital in deed of existence of alley without any grant of it 253
2. cost of improving alley, how apportioned 600
APPEALS—See New Trial, 4, 5, 13, 15—
1. *amount in controversy*—where plaintiff is appellant—where defendant is appellant 734, 137, 585
2. *amount in controversy* is that claimed in petition, though the allegations are insufficient to sustain the claim 510
3. *amount in controversy* in contest between creditor having *nulla bona* and another creditor over a fund in hands of garnishee . . 652
4. *accused escaping* pending his appeal, it will be dismissed 152
5. transcript filed *out of time*, court dismisses appeal *sua sponte* . . 214
6. party moving for affirmance as *delay case* must file the entire transcript 288
7. no reversal on partial transcript unless pleadings show appellee not entitled to relief 369
8. death of successful party, effect on right to appeal 288
9. no reversal in order that *issue* of fact may be *more clearly presented* by the pleadings 222
10. appeal lies from order of circuit court refusing to allow *claim* against Commonwealth 289
11. court trying *law and facts*, effect of its conclusions on appeal, 702, 369
12. when court tries both *law and facts* and no motion for new trial is made, what can be considered on appeal 702
13. case submitted in lower court on its merits and *dismissed* for *want of jurisdiction*, appellate court in reversing will pass on the merits 450
14. every *judgment* presumably *correct* unless record shows the contrary; original petition being absent presumed to contain every allegation necessary to support judgment 450
15. no appeal from *void order or judgment* until motion to correct is made 509, 510
16. no reversal for *errors of fact*, whether found by court or jury, unless the finding is flagrantly against evidence 509
17. contest between creditor and assignee for benefit of creditors, as to right to a fund, judgment in favor of assignee is not judgment for payment of money, therefore no *damages* on affirmance, 510
18. appeal is *waived* by coercing satisfaction of judgment, but record evidence of coercion must be filed 510
19. misconduct of jury first complained of on motion for new trial, no ground for reversal 523
20. *errors* committed on *both sides* which *off-set* each other, judgment affirmed 585
21. no *appeal* being proper from *county to circuit* court, none was proper from the circuit to Superior court 585
22. *exception* to final judgment is unnecessary, even though it was prepared by counsel 651

Digitized by Google

APPEALS—Continued— PAGE.
23. *consent of parties* can't confer jurisdiction where no appeal was granted 652
24. order of *circuit court* allowing claim against county is judgment for money, right to appeal from 734
25. no reversal where there is any evidence tending to establish guilt, 222
26. jurisdiction of Court of Appeals to try appeals in road cases . . 584
27. plea of limitation defective, but, no objection being made in lower court, no reversal on appeal 448
APPEALS TO CIRCUIT COURTS—
1. no new matter admissible, though parties consent or failure to object to it 585
2. no appeal from refusal of county court to take stock in turnpike, 585
3. in action by Commonwealth for penalty appeal lies from county to circuit court 90
4. appeal from board of contested elections, right to object to notice after submission 739
5. poll books should be copied into bill of exceptions 739
APPRAISERS—See Sale of Personal Property.
ARBITRATION AND AWARD—
1. party may waive his right to be present at the arbitration—no copy of award need be served on him 387
2. promise of arbitrators to *re-open* award not valid 388
3. engineer of railroad may act as arbitrator between the road and a contractor 441
ARCHITECT—
1. right of to recover for plans which are not accepted 754
ARGUMENT—
1. no reversal for improper argument of Commonwealth's attorney, 50
2. court should control and limit right of argument by counsel . . 527
3. mode of excepting to order of court limiting 764
ARREST—
1. power of peace officer to arrest without warrant 510
ARREST, ORDER OF—
1. is statutory remedy, statute must be strictly pursued 439
2. verification of affidavit insufficient 439
ASSIGNMENT—See Assignor and Assignee—
1. neither a judgment nor replevin bond is assignable so as to vest right of action in assignee 734
2. right to sign contract for personal services 736
3. claim against decedent's estate allowed by commissioner and assigned right of assignee 734
ASSIGNMENT FOR BENEFIT OF CREDITORS—
1. liability of sureties on assignee's bond, where he has wasted the estate 121
2. creditor may sue for settlement as soon as assignee qualifies . . 122
3. acceptance of deed by assignee binds creditors until they avoid it, 214
4. made by agreement of creditors construed to emrace land levied on by one of them 359
5. recital in deed that some creditors threaten to sacrifice the property does not show fraudulent intent 652
6. assignee employing assignor as salesman, no badge of fraud . . 652
7. assignment by partner of firm assets, rights and duties of assignee, 652
8. assignment of land in two counties, assignee may sue in either county 652
9. what constitutes an assignment for benefit of creditors 735
10. assignee may sue on contract made with assignor, proper parties, 745
ASSIGNMENT OF ERRORS—
1. act repealing § 756, Civ. Code, repeals all amendments to that section 223
2. complaining of commissioner and not of the court can't be considered 294

Digitized by Google

ASSIGNMENT OF ERRORS—Continued— PAGE.
3. amendments to allowed only in cases mentioned in Code . . . 450
4. that court erred in overruling motion for new trial is too general, 584
5. act repealing applies to appeals prosecuted *since* that date . . 369, 585
6. that court erred in entering judgment on special findings . . . 667
ASSIGNOR AND ASSIGNEE—See Bills & Notes, 5; Vendor & Vendee, 5—
1. assignor of note, giving mortgage to secure it, is guarantor and is not released by failure to pursue maker with diligence 289
2. assignee holding several notes, *recourse on assignor* lost as to some, not as to others—application of payments 290
3. liability of assignee's attorney for failure to use due diligence against maker 290
4. vendee's note for purchase money of land payable on condition that a certain claim against the land is satisfied, condition binding on assignee of note 526
5. diligence required of assignee of note in suing maker at first term of court 653
6. liability of attorney for failing to use due diligence on note entrusted to him for collection 290
7. right of innocent purchaser of land as against assignee of purchase money note where no lien was reserved in the deed . . . 318
ATTACHMENTS—See Rent, 1, 2, 3—
1. discharge for failure to allege claim is just, though the claim is uncontroverted 214
2. bond to secure discharge of makes obligor personally liable . . 299
3. judgment for *general* damages for maliciously taking out attachment is bar to action for *special* damages on the *bond* 473
4. town marshal can not levy 510
5. misjoinder of action on bond and for maliciously suing out attachment waived by answer 511
6. measure of damages in action on attachment bond 511
7. affidavit for attachment defective, but, process being duly served, judgment of sale was avoidable only, and purchaser took good title 532, 359
8. Civ. Code, § 194, sub-sec. 2, does not apply to action for money obtained by fraud, though the action is in form *ex contractu* . . 582
9. exception to final order sustaining attachment, court may consider on appeal all interlocutory orders, though not excepted to, 585
10. averment that "*debtor is selling his property with intent to cheat his creditors*," omiting "*fraudulent*" before intent 586
11. affidavit must state the amount affiant ought to recover 586
12. clerk has no authority to issue attachment till bond is given . . 586
13. no appeal from the order sustaining attachment unless judgment is rendered on its merits 586
14. jurisdiction of court depending on subsequent consent of parties, effect of such consent, when given, on prior attachments 653
ATTORNEY AND CLIENT—See Alimony, 4, 5; Argument, 1, 2—
1. misfortunes of the English attorney whose fee is a *honorarium*, and can't be enforced by suit 152
2. liability of attorney for failure to use due diligence against the maker of a note 290
3. one of several defendants employing counsel for the others who accept the services, liability for fee 360
4. attorney receiving money for his client which he knows belongs to another, no demand necessary 360
5. contract for contingent fee construed where the suit was settled without the help of the attorney 735
6. attorney assisting the prosecution may testify against accused . 305
BACON, LORD—
1. requisites of a good judge 755
BAIL BOND—See Fines and Forfeitures, 2—
1. order admitting accused to bail by the *wrong name*, no defense to surety on the bond 653

Digitized by Google

BANKRUPTCY— PAGE.
1. creditor appropriating collaterals entrusted to him as security, effect of discharge on his liability 152
2. right of assignee to appeal from judgment rendered against the bankrupt 289
3. discharge does not release one as surety on county levy bond . 360
4. debtor must apply for his discharge in one year; to what cases this limitation applies 586
5. effect of *discharge* on debt reduced to judgment 735
6. mode of pleading discharge 735
7. unreasonable delay of debtor in obtaining his discharge, right of creditor 586
BANKS—
1. liability to depositor, effect of latter requesting cashier to make investments for him 215
2. charter prohibiting indebtedness in excess of the capital stock, personal liability of directors and president for such excess . . 328
3. care required of president and directors respectively in managing the bank 328
BAR ASSOCIATION—
1. officers and committees for 1884-5 . . . . . 2, 673, 794
BASTARD—See Decedent's Estate, 1—
1. right of bastard to his mother's personalty as against her surviving husband 471
2. agreement of father to support bastard in consideration of mother surrendering custody 714
BASTARDY—
1. proceedings may be settled by agreement of parties out of court, 736
2. note executed to grandmother of bastard, his mother being infant, is valid 736
BAWDY HOUSE—
1. liability of city for failing to close it up 292
BENEFIT OF CLERGY—
1. the last occasion of making this plea in Kentucky 508
BILL OF EXCEPTIONS—See Bystanders, 1, 2—
1. party can't contradict statements of the bill by affidavits filed after the bill 72
2. where the bill *purports* to state the evidence the *signature* of the judge will be treated as his *certificate* of that fact 72
3. bill can not be filed *prior* to judgment 215
4. showing affirmatively that it does not contain all the instructions, court can't consider correctness of any 72, 450
5. is valid if tendered in time, though not signed and filed until later, 736
6. the court and not the clerk certifies what instructions were given and refused 736
7. right of party objecting to judge's corrections of the bill 736
8. right of parties to controvert corrections made by the judge . . 72
9. where the bill sets out the instructions it presumably contains all that were either given or refused 72
10. bill must embrace exhibits 306
BILL OF PEACE—
1. distinguished from bill *quia timet* 86
BILLS AND NOTES—See admissions, 1—
1. "*kiss my foot*" endorsed on bill, no acceptance 55
2. note in hands of the maker endorsed by payee, presumptions as to payment 188
3. endorser having assigned for benefit of creditors, notice of protest given to assignee is sufficient 188
4. right of drawer to compel holder to prove genuineness of signatures of prior parties 215

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BILLS AND NOTES—Continued— PAGE.
5. payor knowing note is to be assigned is not deprived of defenses good against assignor 511
6. renewal of note, same defenses may be made against it as against original 511
7. one accepting bill *subject to a credit* not material alteration such as to release other parties 654
BOARD OF TRADE—
1. right to exempt that of a particular city from taxation 769
BONDS—
1. surety being also a beneficiary does not invalidate the bond . . 360
BOUNDARY—
1. that fixed by processioners is *prima facie* the true one 586
2. statement made by owner of land to stranger as to where his line is, effect of 586
3. line long recognized acquiesced in can't be disturbed 655
BRIDGES—
1. application to county court for erection of new bridge, right to compel court by mandamus to act 755
BURKE, EDMUND—
1. his opinion of the *nisi prius* lawyer 751
"BYSTANDERS"—
1. jurors are and may attest bill of exceptions 659
2. form of exceptions attested by 659
CAIRNS, LORD CHANCELLOR—
1. his life and character 677
CATTLE—
1. practice of dishorning not wantonly but for profit of owner . . 54
CAUSA PROXIMA, CAUSA REMOTA—
1. negligence of employe of gas company in leaving key in pipes *held* proximate cause of subsequent explosion and company is liable 464
2. neglect of water company to supply water, *held*, too remote cause of subsequent fire, company not liable 453
CERTIFICATE OF DEPOSIT—
1. certificate of deposit, effect of 71
2. by what law such certificate is governed 71
3. action on, barred in 3 years 71
CHAMPERTY—
1. vendee in possession but vendor still holding legal title, the latter's deed to third party not champertous 290
2. possession may be adverse under statute of limitations though not so under champerty act 707
CHARITABLE USES—
1. particular devise for educational purposes not void for uncertainty 26
2. such devise was for education of *white* children only 26
CHURCHES—
1. schism in, rights of the respective parties in the church property, 290
2. jurisdiction of courts over such questions 291
3. church organized under act of 1814 but not recognized afterwards is governed by Gen. Stats. 291
CITIZEN—See Naturalization, 1—
1. right of to sue his State in Federal courts 57
CLAIM AND DELIVERY—
1. plaintiff's bond to *ob*tain possession being insufficient, right to cancel defendant's bond to *re*tain possession 598
2. dismissing plaintiff's petition for failure to give proper security 598
3. proper action to recover property bought and paid for but withheld by vendor 745

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CLAIMANT'S BOND— PAGE.
1. what defenses obligor may make 360
CLERK OF COURT OF APPEALS—
1. does not receive commission from Governor 638
2. having certificate of board of examiners as to his election he is entitled to qualify, though his eligibility is in question before board of contested elections 638
CODES—
1. CIVIL CODE.—The following sections construed:—
Section seventeen 266
" thirty-four 124
" thirty-four, sub-sec. 4 297
" thirty-eight 154
" seventy 670
" seventy-four 558
" ninety 7
" ninety-six 388
" one hundred and thirteen, sub-sec. 4 232
" one hundred and fifteen 319
" one hundred and twenty-four 232
" one hundred and twenty-six, sub-sec. 4 . . . . . 65, 304
" one hundred and ninety-four, sub-sec. 8 586
" three hundred and seventeen 324
" three hundred and twenty-six and three hundred and twenty-nine 324, 631
" three hundred and thirty-five, sub-sec. 1, 2 74
" three hundred and thirty-seven 74, 670
" three hundred and forty-four 207, 595
" four hundred and thirty-nine 74
" four hundred and eighty nine and four hundred and ninety-three 311, 741
" four hundred and ninety 218
" four hundred and ninety-nine 559
" five hundred and eighteen 251
" five hundred and ninety-seven 22
" six hundred and eighty-five 368
" seven hundred and thirty-eight 214
" seven hundred and fifty-six 223
" seven hundred and sixty 214
2. CRIMINAL CODE.—The following sections construed:—
Section two hundred and sixty-two 195
" two hundred and sixty-three 195
" two hundred and sixty-eight 515
" two hundred and seventy 182
" two hundred and eighty-one 228, 335
" two hundred and eighty-five 305
" three hundred and fifty-three 132
CODIFICATION—
1. appointment by State Bar Association of Committee on 3
2. opinion of Judge Dillon on 153
CO-HABITATION—
1. past co-habitation as the consideration of a contract, rights of parties 655
COMMISSIONER IN CHANCERY—See Exceptions, 1; Judicial Sale, 6, 9—
1. right of parties to agree on his compensation 440
2. of Louisville Ch. Ct. his allowance is in discretion of chancellor . 440
COMMON CARRIERS—
1. may limit their liability by special contract but can't stipulate against their own negligence 587, 291
2. are ordinarily liable to consignee, but shipper is agent of latter and may bind him by special contract 291

Digitized by Google

COMMON CARRIERS—Continued— PAGE.
3. injunction to restrain injurious sale under execution of property of 298
4. package delivered to carrier's agent, what facts necessary to charge the company for his failure to deliver 587
5. shipper is not bound by his statement as to the value of package where it was appropriated by such agent 587
6. or by the special contract of carrier limiting its liability 654
COMMON SCHOOLS—See Charitable Uses—
1. act establishing *separate* fund for negroes is unconstitutional . . 413
CONSIDERATION—See Fraud, 1; Husband and Wife, 13—
1. all written promises purport a consideration 118
2. pleader alleging the consideration, though unnecessarily, must prove it as alleged 440
3. deed reciting a good consideration, right of grantee to prove a valuable one 737
CONSPIRACY
1. evidence held sufficient to prove conspiracy; co-conspirators incompetent witnesses 32, 229
2. upon indictment for conspiracy to commit a crime, what evidence is competent 658
CONSTITUTIONAL LAW—
I. CLASS LEGISLATION—
1. act conferring on person performing no public service the right to sell, without order of court, mortgaged property 547
2. act exempting from taxation city board of trade is void 769
II. COMMERCE BETWEEN THE STATES—
1. an act requiring a license of all peddlers, an amendment exempting residents of this State unconstitutional 711, 349
2. such amendment did not repeal license as to all but being itself void left license in force as to all 711, 349
III. CONTRACTS, IMPAIRING OBLIGATION OF—
1. right of married woman to vacate erroneous judgment may be taken away by retroactive law 250
IV. RACE DISCRIMINATION—
1. act establishing separate school fund for negroes is unconstitutional 413
V. TITLE TO ACT—
1. of particular act not foreign to its contents 789
VI. MISCELLANEOUS—
1. act directing county court to submit to popular vote questions of subscribing to railroad need not *fix limit* to amount of the subscription 361
2. right of the courts to set aside acts of the Legislature is peculiar to this country, origin and growth of the idea 676
3. if act is separable it may be valid in part and unconstitutional in part 789
CONTINUANCE—
1. no ground for if absent testimony is expert and merely cumulative 50
2. only one continuance on account of absent witness unless it appears his attendance can be procured 229, 655
3. refused, evidence of absent witness being immaterial 368
4. no ground for after trial had begun that witness testified without being sworn or that appellant did not know that he had been in penitentiary 407
5. granting of is in discretion of lower court 440
6. affidavit as to evidence of absent witness should state the facts which he will testify to and not his opinion 441
7. case being submitted no continuance that amended petition might be filed 523

Digitized by Google

CONTINUANCE—Continued— PAGE.
8. failure to deliver *spoe* to officer not excused because defendant *heard* witness had left the State 655
9. Commonwealth's attorney ordered witness to conceal evidence from accused, ground of continuance 408
CONTRACTOR—See Mistake, 1—
1. and railroad in dispute between them, the engineer of the road may act as arbiter 441
2. engineer's estimates made during progress of work not binding in making final settlement 441
3. contractor demanding more than he is entitled to, effect of . . 441
CONTRACTS—
1. illegal contract may be cancelled 655
2. right to assign contract for personal service 736
3. promise of one to debtor to pay his debts, rights of the creditors, 707
CONTRIBUTION—
1. among sureties, cause of action accrues when one has paid more than his share 184
2. surety paying debt barred by limitation as to his co-surety, not entitled to contribution 184
3. stockholder paying debt of insolvent corporation, his right to contribution from other stockholders 398
4. surety who paid debt reimbursed in part by principal, what he may recover from his co-surety 451
5. surety paying debt by executing his note, right to contribution and that too though creditor should afterwards release him on the note 491, 768
6. contribution among directors of a corporation guilty of constructive fraud or breach of trust 761, 398
7. suit against several sureties allowed to abate as to one till barred by limitation, effect of on right to contribution from him . . . 184
CONVERSION OF PROPERTY, EQUITABLE—
1. money directed to be converted into realty not regarded as realty unless the conversion is ordered by proper instrument 217
2. verbal direction of married woman on her death bed is ineffectual, 217
CONVEYANCE—See Deed—
CORPORATION—See Stockholders, 1, 2—
1. organization under Gen. Stat., notice must be given, otherwise stockholders individually liable 292
2. indictment against corporation should allege its existence . . . 306
3. petition should allege the fact of incorporation 522
4. *dividends* should be paid out of *net gains* only 588
5. liability of directors for speculating in assets of the company . 760
6. corporation continues liable for its debts after its property has been sold 761
7. for what offenses corporation may be indicted 292
COSTS—See Alimony, 3—
1. reversal of judgment with leave to plaintiff to amend petition, his liability for costs 656
2. who is "*unsuccessful party*" in the meaning of agreement, that he pay cost of copying record 292
3. when a cost of a copy of the record may be taxed as costs . . 293
4. right of clerk to charge for copying under such agreement where no copy is in fact made 316
5. questions as to liability for costs on appeal should be raised before submission or by petition for rehearing 737
6. one applying for removal of gates for public roads, his liability for costs 737
COUNTERCLAIM—
1. precision required in pleading for misrepresentation as to value of goods sold 221

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COUNTERCLAIM—Continued— PAGE.
2. plaintiff suing for trespass to land, defendant may set up his own title to land as counterclaim 387
COUNTY—
1. in subscribing to stock in railroad acts as *quasi* private corporation 361
COUNTY BONDS—
1. a fund accumulated for payment of *principal* of the bond can't be applied to the *interest* 361
2. county estopped to deny validity of its bonds 361
3. innocent holder not bound to see that provisions of the acts were complied with 361
4. judgment against county to be enforced against its *private* property only 361
5. county having made one levy to pay interest coupons can't be required to make another 656
6. creditor merging interest coupons into judgment, right to be paid out of the interest fund 656
COUNTY CLERK—
1. special election to fill vacancy, when to be held 233
COUNTY COURT—
1. is court presided over by county judge 360
2. has same jurisdiction in criminal cases as justice of peace . . . 501
3. statute *imperatively* directing county court to do *ministerial* act, county judge may do it alone or jointly with the justices 361
4. county court having power to act and refusing to do so may be compelled by mandamus 755
5. act requiring county court to submit to vote questions of subscribing to railroad, constitutionality of 361
6. county creditor proceeding by notice to enforce his claim against sheriff, what notice must contain 215
COUNTY LEVY—See Sheriff, 8—
1. when bond for must be executed 215
COURTS—
1. meaning of the phrase "*co-extensive*" in defining jurisdiction of a court 656
COVENANTS—
1. *parol* covenant to maintain fences does not run with land . . . 17
2. right of vendor where some lots in a tract are sold with restriction as to kind of building to be erected and other without it 426
CRIMINAL LAW—
1. statutory offense of stabbing in sudden affray, instruction as to sufficient provocation erroneous 442
2. violation of statute may be punished after the statute is repealed 520
3. presumption as to the prisoner's guilt, difference of English and French law as to 580
CROSS EXAMINATION—
1. how to cross examine well 679
CURTESY—
1. curtesy in separate estate, right to 588
DAMAGES—
1. exemplary awarded for *gross* negligence only 512
2. in action against railroad for personal injuries, conductor treating passenger with insult, she may recover exemplary damages, 668, 512
3. wrongdoer is liable for all the natural consequences of his wrongful act 453, 464
DAMS, ERECTING—See Franchise, 2.
DAVIE, G. M.—
1. response to toast—"how to argue a bad cause"—at bar association dinner 141

Digitized by Google

PAGE.

DE FACTO OFFICER—
1. act of special judge, validity of as *de*facto officer 525
DEBTOR AND CREDITOR—
1. creditor accepting note on third party and agreeing to pay balance to other creditors, their rights 588
2. right to devise absolute estate and exempt it from liability for devisee's debts 381
3. land sold on promise of grantee to pay grantor's debts, rights of creditors 707
DECEDENT'S ESTATE—
1. bastard suing his father's estate for support, competency of his mother as a witness 590
2. re-settlement can't be ordered in county different from that in which personal representative qualified 218
3. right of personal representative to sue for settlement of the estate though there is no personalty 512
4. suit for services rendered decedent, competency of statements made in various wills as to the services and their value 589
5. statement as to what witnesses would have performed same services for incompetent 590
6. one may testify for herself when one interested in the estate has testified 590
7. assignment of claim against the estate which has been allowed by court, rights of assignee 784
8. contract with decedent being otherwise proved, a party may testify to what he did in performing his part of it 742
DEDICATION—See Alleys, 1.
DEED—See Power of Attorney, 1—
1. recital of a deed in another deed, effect of as evidence 201
2. reformed where tract described as "*100 acres more or less*" contained 241 216
3. effect of *recital* in deed of existence of alley *without* any express *grant* 253
4. deed construed conveying conflicting estates 313
5. conveying life estate to one instead of fee-simple, as intended, may be reformed 361
6. parol evidence admissable to show the circumstances under which a deed was made 442
7. construed most favorably to grantee 442
8. deed absolute in form, court refused to consider a mortgage . . 442
9. the names of grantors were *omitted from the granting clause* of the deed, effect of 512
10. the land held liable for necessaries only though the deed made it liable for debts generally, intention of grantor controls 568
11. rights of grantee in unrecorded deed 737
12. valuable consideration may be shown though that recited in deed is love and affection 737
13. grantor describing himself improperly as executor instead of guardian 201
DEFENSES—
1. surety's plea that creditor had released a lien on the debtor was not exclusively legal defense, no transfer 442
2. denying existence of partnership and pleading that it was unlawful not inconsistent 666
DEMAND—
1. attorney receiving money for his client which he knows belongs to another, no demand is necessary 360
2. one demanding more than is due him, effect of 441
3. guarantor, his right to a demand of payment 592
DEMBITZ, L. N.—
1. review of Mantle v. Beal 4

Digitized by Google

DEMURRER— PAGE.
1. overruled, may afterwards be sustained and right to amend given, 307
2. petition stating no cause of action against any defendant, effect of demurrer by one party only 746
DEPOSITION—
1. no objection to reading of that witness lives in county where action is pending 216
2. exception to competency overruled if any part is competent, 216, 588
3. exceptions waved by court failing to act on 659
4. lodged with papers but by oversight of clerk not marked, effect of 787
5. both parties to equitable action having given deposition, one dies, deposition of the other may be read 657
DEPUTY—See Sheriff, 4, 7, 10—
1. right of sheriff to appoint deputy to execute process in another county 334
2. liability of such deputy for homicide committed while serving process 334
DESCENT AND DISTRIBUTION—
1. when heir is chargeable with debt due the estate by his father, 48, 216
2. right of widow to exempted articles in addition to her distributable share 738
3. infant dying without issue, descent of its land inherited of its *mother* 621
4. right of heir to sue for ancestor's unadministered estate 296
5. suit against heir for ancestor's debt, administrator should be joined 296
6. land descended in another State, liability of heir here for ancestor's debt 490
7. liability of heir or devisee to the extent of assets descended or devised 363
DEVISES—See Charitable Uses, 1—
1. devisee being dead, liability of his child for debt due the estate. . 48
2. particular devise is defensible fee 216, 293
3. testator valuing land devised, the valuation is part of the devise 216
4. devise construed to convey life estate to one with remainder to his children because such estates had been given the other devisees 362
5. intention of testator being in doubt construction favorable to non-alienation will not be adopted 362
6. land devised afterwards sold by testator, rights of devisee . . . 376
7. devise to M "*as trustee and guardian*" of H, M held as guardian only and at H's majority she was entitled to the estate 443
8. prohibition of sale for reinvestment applied to life estate only and not to remainder 513
9. specific legacy to granddaughter, *held*, she was not entitled in addition to her share of the estate as heir 513
10. meaning of the words "*bodily heirs*" 588
11. devise of defeasible fee with remainder over, right of remainderman to unconsumed profits at death of first devisee 589, 657
12. devisee accepting trust funds of executor in payment of individual debt acquires no title 670
13. testator devising particular fund to maintain his son, that fund being exhausted, right of step-father who had furnished maintenance to subject realty 738
14. devise "to her and her heirs, and if she dies without issue" it to revert, creates fee simple 738
15. defeasible fee ought not to be created by implication 293
16. liability of devisee for debts of devisor 363
17. mere declaration of intention to make devise to particular person, his rights 526

Digitized by Google

DEVISES—Continued— PAGE.
18. devise of estate in trust free from devisee's debts, effect of . . . 381
19. devise of absolute estate to one, vesting power of alienation in another . . . 381
20. father directed equal division of his estate, this applied to that he owned at his death and not to land deeded his children during his lifetime . . . 47
DIRECTORS—See Banks, 5, 6—
1. liability of for speculating in assets of corporation . . . 760
2. contribution among directors . . . 761
DISCOVERY—
1. action for under Civil Code, section 685, where there is only one defendant . . . 368
2. filing bill for creates no lien . . . 363
DIVORCE—See Alimony—
1. husband a native German but living in France, though not naturalized there, difficulty of wife in obtaining divorce either in France or Germany . . . 604
2. where husband ordered wife to leave, no abandonment by her . . . 216
3. though the deposition shows the residence of the parties the certificate of officer must accompany it . . . 217
4. divorce under the Romans . . . 753
DOWER—
1. no dower in land for which bond for title was given before the marriage . . . 201
2. *infant* married woman joining in husband's deed, effect of . . . 201
3. doweress having suffered sale of productive real estate without objection can't complain that her one-third is unproductive . . 293
4. dower though not assigned may be sold under execution . . . 293
5. widow may claim dower or homestead but not both . . . 297
6. is barred by wife relinquishing in body of the deed and signing and acknowledging . . . 443
7. widow allowed homestead is chargeable with it in allotting dower, 657
8. dower in indivisible property, *receiver* appointed to pay widow one-third of rents . . . 658
9. wife receiving more than value of her dower, right of husband's creditors to the excess . . . 518
10. right to dower in partnership real estate . . . 665
11. appropriation to partnership purposes of land to which dower had already attached . . . 666
12. widow adjudged dower but second judgment confirming commissioner's report did not restrict her interest in the land to dower, effect of . . . 746
13. widow is entitled to homestead in her dower . . . 636
DRUNKENNESS—
1. crime committed while drunk, punishment of among the Greeks, 507
2. no excuse for murder . . . 443
DURESS—
1. advantage taken of one's pecuniary distress to obtain unfair contract is duress . . . 263
ELECTION—
1. special judge can't be elected for a whole term but parties, agreeing such judge may try their case, are estopped afterwards to object . . . 17
2. on appeal to circuit court from board of contested elections the notice can't be objected to after the case has been submitted . . 739
3. on appeal all evidence, including the poll books, should be put in the bill of exceptions . . . 739
4. vacancy in county clerkship, time for special election . . . 233
ENGINEER—
1. of railroad may act as arbiter between it and contractor . . . 441

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ENGINEER—Continued— PAGE.
2. conclusiveness of his estimates in making final settlement . . . 441
ENTRY—
1. upon defined boundary, rights acquired by as against intruder or trespasser . . . 589
EQUITIES—
1. adjusting equities between wrongdoers where they are not equally guilty . . . 622
EQUITY—See Jurisdiction, 3—
1. rules of equity apply where equitable defense is pleaded in action at law . . . 267
ESTATES—
1. defeasible fees . . . 216, 293
2. fee simple . . . 738
3. defeasible fee not created by implication . . . 293
4. prohibition of sale for re-investment applied to life estate and not remainder . . . 513
5. meaning of "bodily heirs" . . . 588
6. right of remainderman to unconsumed profits at death of tenant of defeasible fee . . . 589, 657
ESTOPPEL—See Posthumous Child, 2—
1. right of married woman to recover her land on account of defective acknowledgment, after she had sold tract received in exchange, 29
2. effect of admission that forged signature is genuine . . . 72
3. mere recital in deed of existence of an alley without any grant of it estops grantor but not a subsequent purchaser . . . 253
4. vendor not estopped by his delay in asserting his lien . . . 589
5. vendee accepting the goods at price fixed by appraisers is estopped to complain of their mistakes . . . 655
6. widow accepting property devised to her in lieu of her own, devised by her husband to others, is estopped . . . 740
7. parties agreeing on special judge to try their case are estopped afterwards to object . . . 17
8. widow qualifying as administratrix of will not estopped to renounce its provisions . . . 453
9. infant permitting representation as to his estate is estopped thereby . . . 513
10. county estopped to deny validity of its bonds . . . 361
11. infant married woman joining in husband's deed, effect of . . . 201
EVARTS, W. M.—
1. President Lincoln's wish to appoint him Chief Justice . . . 603
EVIDENCE—See Agency, 4; Decedent's Estate, 1, 4, 5, 6; Deed, 1; Judgments, 5, 6; Larceny, 2, 3; Manslaughter, 1, 3; Wills, 1, 3, 9—
1. cross-examining witness as to collateral matter for purpose of contradicting him . . . 20, 50
2. witness being dead, right to impeach testimony given on former trial by proving contradictory statements . . . 50, 368
3. right of party to contradict his own witness by proof of different statements at other times . . . 457
4. right of court to permit re-examination as to same matter . . . 686
5. proving general custom in the absense of direct evidence . . . 240
6. witness testifying for defendant, Commonwealth might prove he had previously stated he knew nothing about case . . . 305
7. attorney assisting prosecution may testify against defendant . . . 305
8. conspiracy to commit crime, general character of evidence which is competent . . . 658
9. party having possession of books and failing to produce them, presumptions therefrom . . . 659
10. statement of attorney who drafted lost paper as to its contents competent . . . 658
11. trial of issue of fact in equity, evidence may be oral . . . 154

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EXCEPTIONS—See Appeals, 22— PAGE.
1. to allowance in commissioner's report should point out particular sums complained of 294
2. overruling exceptions to appellee's evidence no prejudice to appellant as appellee's case was made out by other evidence . . . 369
3. to deposition were waived by party failing to have court act on 659
EXECUTIONS—See Indemnifying Bond, 1—
1. levy need not state in what county the land levied on is located, 294
2. a levy held insufficient in Federal Court, creditor sues sheriff and sureties in State Court for laches, the levy there held sufficient, effect of the contradictory decisions on the rights of the creditor and sheriff 294
3. levy on land subject to lien, suit in equity to settle rights of claimants 295
4. injunction to restrain sale of exempted property under execution 741, 298
5. sheriff selling at *private* sale passes no title 362
6. execution plaintiff becoming purchaser at sale and subsequently accepting payment of the amount bid by him, his rights 362
7. sale ordered for more than was due should be set aside but the execution lien still remains 491
8. purchaser agreeing to give defendant time to redeem the land sold, his rights on failure of defendant to redeem 590
9. effect of reversal of judgment on rights of execution purchaser, 662
10. how defendant may prevent sale of his exempted personal property 741
EXECUTORS—See Personal representative.
EXHIBITS—
1. rule to file, sufficiency of response that exhibit is in possession of non-resident 222
2. must be copied into the bill 306
3. can't take the place of allegations in the pleadings 597
EXPERTS—
1. hypothetical questions need not be confined to facts conclusively proved 658
2. opinion of expert though incompetent was not prejudicial as jury could judge of the matter as well as he 305
EXTRADITION—
1. right to try criminal for other offense than that for which he was extradited 152
FACTOR—
1. money advanced A to buy goods to be shipped for sale, liability of the goods for his other debts 587
FALSE IMPRISONMENT—
1. action for must be brought in county where arrest was made . . 555
2. action against judicial officer for must allege that he had no jurisdiction 590
FEME SOLE—
1. execution against her to compel payment of money due as garnishee 219
2. may employ her husband as her agent to carry on her business . 518
FINAL ORDER—
1. order sustaining demurrer to indictment and referring case back to grand jury not final 288
2. order reviving action is not final 514
3. void order setting aside interlocutory order not final 514
4. in action to enforce lien for street improvements order of reference not final 514
5. sustaining attachment excepted to, court may consider on appeal all interlocutory orders though not excepted to 587

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FINAL ORDER—Continued— PAGE.
6. in action between lien claimants order adjudging one priority and appointing receiver, not final 739
FINES AND FORFEITURES—
1. right of State to recover those collected by a city barred after five years 519
2. remission by Governor *before judgment*, effect on fees of Commonwealth's attorney and clerk 200
FORCIBLE ENTRY AND DETAINER—
1. trespasser ousted by second trespasser, right of owner to forcible entry against latter 444
2. what notice to quit must be given 444
3. parties in possession of land sold at judicial sale, right of purchaser to forcible detainer 514
4. no new trial can be granted in justice's court 659
FORGERY—
1. necessary allegations in indictment for 591
2. not indispensible to prove that the name forged is in handwriting of accused 591
3. one whose signature is forged, effect of his admission of its genuineness 72
FRANCHISE—
1. definition of 295
2. grant of privilege of erecting dam of certain height, rights of grantee 659
FRAUD—
1. inadequacy of consideration as evidence of fraud 295
2. facts constituting, must be specifically set out 442
FRAUDS, STAT. OF—See Vendor and Vendee, 2; Way, Right of, 1—
1. verbal contract for sale of land is good as defense 363
2. land must be more specifically described in the writing than as "*my lands*" 444
3. oral declaration of existence of trust as to land can't be enforced, ... 445
4. promise to answer for debt of another, decisions of Court of Appeals on 455
5. particular contract *held* not a promise to answer for the debt of another 592
6. one performing some act in consideration of oral promise to convey land, his right to compensation for failure to convey . . 714
FRAUDULENT CONVEYANCE—See Witness, 3—
1. judgment in action to hold a conveyance as assignment for benefit of creditors, no bar to action to set it aside as fraudulent . 295
2. can't be set aside without return "*nulla bona*" though debtor is dead 363
3. creditor properly suing in equity for any other purpose may attack the conveyance without return of *nulla bona* 154, 363
4. deed upheld on evidence of four unimpeached witnesses as against mere suspicion of fraud on the other side 458
5. object of deed being to prefer creditor does not make it fraudulent 514, 515
6. conveyance by father to son in consideration of past maintenance, not fraudulent 515
7. conveyance from mother to daughter when former was insolvent and known by daughter to be so is fraudulent 515
8. right of surety to set aside fraudulent deed of his principal . . 591
9. deed from sister to brother for inadequate consideration, grantor retaining possession, *badges of fraud* 591
10. plaintiff must have return of *nulla bona* unless it is waived by failure to object—mode of objecting 591
11. neither party to a fraudulent deed acquires any rights 591

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FRAUDULENT CONVEYANCE—Continued— PAGE.
12. conveyance to defraud creditors recinded, even as between grantor and grantee, and their equities adjusted 622
13. land purchased at judicial sale by father and conveyed to his sons, *held*, on the evidence not fraudulent 660
14. grantee must have notice of grantor's fraudulent intention . . 660
15. grantee is necessary party to action to set aside the deed, effect of dismissing action as to him 739
16. husband conveying land as security for wife's debt, right of grantee as against husband's creditors 514
GAMING—
1. right of wife to recover money lost by her husband at cards, 58, 124
2. particularity required in framing indictment for 134
3. "*permitting gaming on one's premises*" may be proved by one who took part in the game, such person not an accomplice 217
4. two persons playing together not accomplices, one may be indicted on evidence of the other 517
GARNISHMENT—
1. though the writ did not specify the debt, answer of garnishee identifying it creates *lis pendens* 445, 653
2. but answer can't cure such defects in the writ so as to affect *prior* attachments 445
3. creditor serving such writ not entitled to priority as against assignee for benefit of creditors 445
4. waiver of defects in writ against corporation by its agent answering 445
5. judgment by default against garnishee is improper where personal judgment was *not prayed* for 517
6. pleadings did not authorize personal judgment vs. the bank as garnishee 517
7. accounts in hands of attorney for collection, garnishment of creates no lien 660
8. right to garnish married woman trading as *feme sole* 219
9. bond to discharge attached fund authorizes personal judgment against obligor 299
GAS COMPANY—
1. may require deposit of consumers 56
2. employe sent to turn off gas left pipes in such condition that it continued to flow and filled the cellar, some one entering with a light explosion occured, liability of company 464
3. employe sent to turn off gas left the key in the pipe where a stranger turned the flow on again, liability of company for resulting explosion 464
GUARANTY—
1. of rent upon landlord's covenant to keep tenant in quiet possession, the covenant is condition precedent to the guaranty . . . 118
2. executed consideration between principal and creditor not sufficient to support guaranty 118
3. guarantor of rent not released by failure of landlord to attach tenant 118
4. assignor of note giving mortgage to secure it is guarantor, the guaranty is assignable 289
5. guarantor in letter of credit is not entitled to notice of debtor's default or to demand of payment 592
6. effect upon guarantor's liability of creditor giving debtor further time 592
GUARDIAN AD LITEM—
1. right of court to appoint though there is a statutory guardian . 154
2. failure to appoint renders sale voidable not void 364

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GUARDIAN AND WARD—See Limitation, 2; Sureties, 9— PAGE.
1. degree of care required in collecting debt due ward by *non-resident* creditor 157
2. right to sue for ward in another State, she being adult by the law there 157
3. right of guardian to sue in his own name and when he must sue in infant's name 295
4. no board allowed where ward lived with his mother and cultivated the farm 296
5. the court of the county where the minor *legally* resides appoints the guardian 445
6. domicil of father is the legal residence of child 445
7. right of guardian to expend principal of personal estate in maintenance and education of ward 446
8. in settlement guardian may credit himself with solvent notes surrendered to ward, if not afterwards collected by ward, guardian not liable 446
9. agreement of guardian to give his predecessor time to settle did not release the latter's sureties 600
10. conclusiveness of county court settlement 740
11. right of guardian to claim additional compensation to that therein allowed 740

HABEAS CORPUS ACT—
1. artifice by which the English Act was carried 605

HEIR—See Descent and Distribution.

HOMESTEAD—
1. note executed before June, '66, effect of renewal after that date by only one of original parties 296
2. waiver as to one creditor not such as to all 296
3. right of debtor to assign or dispose of the $1,000 296
4. right of creditor to sell the land subject to debtor's right of occupancy 297
5. widow may elect between homestead and dower but can't claim both 297, 657
6. widow and child living on land at time of passage of act, right to homestead 297
7. widow of grantor, not grantee, is entitled to homestead 517
8. widow and remainderman not both entitled to 568
9. widow entitled to homestead out of her dower as against her own creditors 636
10. widow claiming dower but not homestead waives the latter . . . 636
11. right to homestead once settled wife can't afterwards raise the question by disputing the sufficiency of her acknowledgment . . 364
12. right of infants to homestead as against their adult brothers and sisters though there was no widow 661, 551
13. claimant engaging in business in another State abandons homestead 517
14. claimant must be in actual occupancy of land, mere intention to occupy insufficient 364, 517, 661
15. effect of removal and residence elsewhere for five years 636
16. no homestead as against mortgage for purchase money 364
17. homestead subject to one mortgage but not to the other, rights of mortgagees in sale of the land 660
18. homestead not exempt from debt contracted before purchase of land 740

HOMICIDE—See Self-defense, Manslaughter, Murder—
1. surgical operation on wounded man, liability of his assailant where death ensues 47
2. right of accused to prove blood thirstiness of deceased 54
3. question as to whether death was caused by the *wound* or by a subsequent sickness 305

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HOMICIDE—Continued— PAGE.
4. right of bystander to kill one in order to prevent commission of a felony 364
5. necessity of preserving one's own life does not justify killing another innocent, unoffending person 373
HUSBAND AND WIFE—See Injuries Personal, Action for, 1—
1. *form* of order allowing wife to prosecute action in her own name, 297
2. wife's right to *settlement in equity* of whole amount of a note though husband owed payor 297
3. his right to *release mortgage* made to her 297
4. note for purchase price of wife's land made payable to husband and wife, rights of his *attaching creditor* to 248
5. husband conveying his land to secure his wife's debt, rights of grantee as against husband's creditors, rights of wife to whom creditor conveyed the land 514
6. wife refusing to join in husband's deed unless grantee paid her $500 of the purchase money for her dower *right*, right of husband's creditor to so much of $500 as *exceeded value* of *dower* . 518
7. her property subjected to repay money borrowed by him to improve it 518
8. liability of her general estate for necessaries 518
9. employment of attorney to obtain decree selling her realty for her maintenance is a *necessary* 519
10. in suit for *necessaries* what defenses she may make 519
11. he having converted her property, his subsequent transfer of property to indemnify her *invalid* as against his creditors . . . 661
12. deed made by woman in the interval between engagement and marriage, when void as to husband 674
13. in action to enforce contract between them, though contract is in writing, *consideration* must be alleged 740
14. promise of husband to pay for the surrender of note executed by his wife with his consent is binding 537
IMPROVEMENTS—
1. vendee being dead, his right to recover for improvements vests in his personal representative 748
2. rights of parties to rents and improvements upon recission of contract for exchange of lands 719
3. purchaser of land by parol contract refused a deed, his right to compensation for improvements 748
INDECENT EXPOSURE OF PERSON—
1. indictment charging *several jointly* is demurrable 307
INDEMNIFYING BOND—
1. taken on levying execution *without surety* is invalid 740
INDICTMENT—See Gaming, 1; Liquor Selling, 1—
1. charging more than one offense defendant may demur or require prosecution to elect 221
2. against corporation should allege its corporate existence 306
3. indictment in one court for offense of which another court has exclusive jurisdiction need not be set aside 368
4. two or more persons libeled in *same* writing, one indictment sufficient 419
5. for statutory offense should follow the words of the statute . . 657
6. indictment charging robbery of silver dollar and a warrant of arrest does not charge two offenses 229
INFANT—See Judgments, 1, 2; Process, 3—
1. liability of one employing infant in dangerous business without consent of parent 784, 367
2. infants permitting representation as to their estate are barred thereby 513
3. what are necessaries for 579

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INFANT'S REAL ESTATE, SALE OF— PAGE.
1. joint property which is indivisible, necessary allegations to authorize sale of 217, 741
2. suit by guardian for sale of joint property, infants not necessary defendants 218
3. amended petition asking sale of additional tract, no process necessary 218
4. failure to appoint guardian *ad litem*, renders order of sale voidable, not void 364
5. answer of guardian cured failure to serve process 218
INJUNCTIONS—
1. court in this State may enjoin resident here from selling land in Illinois 8
2. when injunction will issue to prevent a trespass to land or restrain a sale of it 86, 298, 682
3. to restrain execution sale of exempted property need not be asked in same court rendering judgment 298, 741
4. such sale can't be enjoined unless remedy at law is inadequate 298, 741
5. common carrier, right to enjoin execution sale of its property . 298
6. to protect equitable interests from sale under execution 298
7. right to restrain judgment because proper credits had not been given on it 593
8. equities on which injunction is asked must be distinctly set out, 593
9. suit on injunction bond, what attorney's fees are recoverable . 661
10. in action to restrain *trespass to land* plaintiff must have right to possession and be in possession 682
11. injunction not proper mode of *trying title* to personal property . 741
12. statute giving defendant right to action of replevin did not destroy his existing right to an injunction 741
13. injunction to restrain county judge from granting liquor license, 789
INJURIES PERSONAL. ACTION FOR—
1. right of wife to sue for injuries to her husband resulting in his death where he had brought suit in his lifetime and dismissed it settled 14
2. mutual combat, right of one combatant to recover from the other for personal injuries 752
3. one *maliciously* killed, right of his *personal representative* to recover damages 499
INNKEEPER—
1. liability for lost valuables of guests 298
INNOCENT PURCHASER—See Judicial Sale, 7, 12, 14, 16, 17—
1. his rights as against assignee of note for purchase money where no lien was reserved on the land 318
2. purchaser of land subject to mortgage, his liability for the amount thereof 308
3. purchaser insuring such property, mortgagee's rights to policy . 308
4. purchaser at execution sale agreeing to give defendant time to redeem, rights of purchaser on defendant's failure to do so . . . 590
5. purchaser of county bond not bound to see that law was complied with 361
INSANITY—
1. defined 515
2. "uncontrollable impulse" as a phase of insanity and as a defense for crime 604
INSTRUCTIONS—
1. all of them should be considered together 51
2. presumably none other than those set out in the bill were given or refused 72
3. instruction embodying the theory of one side only, improper unless its counterpart is given 95

Digitized by Google

INSTRUCTIONS—Continued— PAGE.
4. peremptory instruction improper where there is any conflict in the evidence 264
5. when error in one instruction is cured by giving another which is correct 51, 305, 662
6. reversal for erroneous instruction though the entire evidence was not before the court 369
7. no reversal for erroneous instruction, not excepted to or made ground for new trial 50, 584
8. *oral* instruction to jury that they should *try the case according to the law and evidence* not prejudicial 662
9. court and not the clerk certifies as to what instructions were given and refused 736
10. if special findings sustain the verdict errors in the instructions are immaterial 631
11. erroneous instruction neither objected or excepted to, no reversal 50

INSURANCE—
1. false statement, if *immaterial*, does not avoid policy 48
2. immaterial that insured was diseased *prior* to but not at the date of the application 49
3. opinion of insured that he had a disease incompetent 49
4. provision in policy forbidding additional insurance, effect of violating 196
5. forfeiture clause in policy for failure to pay interest on premium note *in cash* invalid 271
6. duty of company to so apply dividends due the insured as to prevent *forfeiture* 271
7. policy in *benevolent* company, person entitled to take upon the death of beneficiary 393
8. forfeiture of policy for frilure to pay three annual premiums . 446
9. to maintain action for paid-up policy, plaintiffs must allege surrender of old one 446
10. levy of execution on property is not such change of possession as avoids policy 593
11. the question of ownership of the insured goods being once settled in action between the claimants, it could not be again opened in action against the company on the policy 447
12. proper relief under prayer for judgment for amount of policy and interest 49

INTEREST—
1. in action by passenger against a railroad for personal injuries judgment bears interest 208
2. at conventional rate after maturity of note, reversal for allowing, 289
3. agreed rate of 10 per cent., death of one obligor, applying payments made after death of obligor 299
4. agreement as to interest to be gathered from note and mortgage construed together 515
5. payable in installments, default in, independent action for each installment 516
6. no interest on taxes as damages 516
7. reversal of judgment, interest runs from date of reversal . . . 516
8. petition being uncertain, interest allowed only from date of filing petition 516
9. note payable one day after date, agreed rate runs *until payment* 742
10. interest runs on judgment unless expressly prohibited 447

JOINDER OF ACTIONS—
1. one injured in both his *person* and *property* by the same act, right to bring separate actions 679

Digitized by Google

JOINT TENANT—See Lien, 3— PAGE.
1. one tenant occupying the land, his liability to his co-tenant for rent 519
2. one tenant not entitled to lien on the share of his co-tenant for rents collected by the latter 691
JUDGES—
1. both political parties naming the same candidate 2
2. liability of one who maliciously advises judge to render a judgment 220
JUDGMENT—See Interest, 1, 7—
1. action to vacate on the ground of infancy, when it must be brought 49
2. error of judgment against *infant* apparant on face of record correctable only on appeal 49
3. reversal of judgment, effect of on rights or parties . . . 743, 299, 662
4. such judgment obtained by guardian and money expended on ward, liability of guardian to repay after *reversal* 299
5. given in *evidence*, it can't be collaterally attacked or shown that proceedings were irregular 300, 531
6. judgment in action to which *defendant* was *no party*, right to give it in evidence against him 346
7. mode of attacking, *consent judgment* 365
8. not *void* for uncertainty if by reference to record it becomes plain 447
9. interest runs on judgment unless *expressly* prohibited 447
10. no appeal from *void* judgment till motion to correct is made, 509, 510
11. modifying for fraud, what must appear 516
12. for sale of land must describe land 516
13. though affidavit for *attachment* was defective yet process being duly served judgment was voidable, not *void* 532
14. defendant having paid part of judgment for which he had received no credit may *enjoin* its execution 593
15. *erroneous* judgment can be corrected after expiration of term by appeal only 662
16. amended petition, setting up return of *nulla bona, without process*, judgment on is void 218
17. one who can't complain of verdict, neither can he of the judgment 369
18. judgment need not be excepted to though prepared by appellant's counsel 651
19. court having jurisdiction of subject-matter and parties its judgment is not void 662
20. judgment is not assignable so as to vest right of action in assignee 734
JUDICIAL NOTICE—
1. not taken of acts of another State by pleading the fact and date of their passage 449
2. taking judicial notice of the navigability of streams 671
3. of indivisibility of city lot 742
JUDICIAL SALE—
1. rights of posthumous child in his father's land sold in action to which he was not a party 176
2. mode of determining whether property sold for two-thirds of its value 300
3. debtor being insolvent and property indivisible, sale was not premature though the whole indebtedness had not been ascertained or homestead set aside 300
4. title passes as it stood on day of sale 300
5. of property of persons under disability, decisions on reviewed . 311
6. commissioner can't purchase at judicial sale even jointly with others 365

Digitized by Google

JUDICIAL SALE—Continued— PAGE.
7. purchaser bound by lien notes evidenced by deed filed in the case, 451
8. party is bound by statements of his attorney made at the sale . 513
9. commissioner becoming interested in land sold *after* the sale, effect of 517
10. confirmation of sale after death of defendant and *before* revivor is void 517
11. sale of land in adverse possession, effect of 594
12. sale will not be set aside unless the purchaser is before the court, 668
13. neither defective description of land sold nor defective pleadings makes sale void 668
14. sale to innocent purchaser not set aside on account of misconduct of plaintiff's attorney 668
15. court will take judicial notice of indivisibility of city lot 742
16. *caveat emptor* applies to purchaser, he must except before confirmation of report 742
17. right of purchaser to forcible detainer against parties in possession of land 514
JURISDICTION—See Courts, 1—
1. depending on consent of parties, consent when given relates back, 653
2. equity jurisdiction not destroyed by creating remedy at law . . 741
3. power of courts to order conveyance of land located in another State 8
4. affidavit for attachment was defective but process was duly served, *held*, court had jurisdiction to order sale 531
JURY—
1. evils of general exemption from jury service 53
2. settling verdict by lot 227
3. construction of the jury should vary with the nature of the issue, 606
4. one-sixth of jury lists in Washington Territory are women . . . 755
5. misconduct of jury first complained of on motion for new trial, no reversal 523
JUSTICE OF PEACE—
1. has jurisdiction to try warrant for keeping tippling house . . 300
2. warrants need not conclude "against the peace and diguity," &c., 301
3. what cases involve question of title to land 752
KENTUCKY REPORTS—
1. decline in legal value of 4
LAND—
1. separating timber upon and mines underneath from the soil, in the sale of land 99
2. upon sale of land standing trees pass with it 516
LANDLORD AND TENANT—See Limitation, Stat. of, 17—
1. lease for one year with privilege of renewal, effect of tenant holding over 447
2. tenant subletting without consent of landlord, effect of 519
3. assignee of lease liable for rent at same rate as assignor 663
4. one in occupation of the leased premises, presumably an assignee of lessee 663
5. assignee may relieve himself from further liability by assigning over, he must assign all his estate 663
6. landlord failing to assert his lien on property of tenant does not release a guarantor of the rent 118
LARCENY—
1. one who comes rightfully into possession of goods of another is not guilty of larceny if he afterwards converts them to his own use 34, 675
2. evidence of commission of other larcenies inadmissable except to prove intent 34
3. evidence of extravagant habits of accused *prior* to commission of larceny inadmissible 34

Digitized by Google

PAGE.

LAWYERS—
1. what literary men think of them 435
2. is the study of Latin beneficial to lawyers 530
3. getting on at the bar 673

LEASES—See Landlord and Tenant.

LEGACY—See Devises, 9.

LEGAL TENDER CASE—
1. change of opinion by U. S. Supreme Court 3

LEGISLATION—
1. remedy for hasty and careless 605

LETTERS—See Presumptions, 1, 3.

LEX FORI—See Guardian and Ward, 2.

LEX LOCI CONTRACTUS—See Married Woman, 8.

LIBEL AND SLANDER—
1. right of newspapers to print pleadings containing scandalous matter before judgment 56
2. one may be enjoined from repeating a slander 286
3. on two or more persons *in same writing* one indictment sufficient, 419
4. certainty in describing, in indictment, the mode of publication, 419
5. denying and pleading the truth in justification are inconsistent defenses 231

LICENSE—See Constitutional Law, 2; Municipal Corporations, 2—
1. same license required of pool as of billiard table 653
2. wholesale liquor dealer selling by pint must have license . . 365, 575
3. right of druggist to retail spirituous liquors without license . . 520
4. *wholesale dealer* can sell by wholesale without license 575
5. same penalty for selling malt liquor as for selling spirituous or vinous 575
6. principal is liable for sale made by his agent without license . . 594
7. officer having discretion to grant or refuse a license to sell liquor, right of court to compel him to act 756, 789

LIEN—See Rescission, 6—
1. goods sold upon agreement, they should remain the property of vendor till paid for, lien on 218
2. vendor's delay in asserting lien for purchase money does not estop him 589
3. one tenant not entitled to lien on share of his co-tenant for rents collected by the latter 699
4. land sold on promise of vendee to pay debt due third person, the creditor has lien 707
5. party lending money to vendee to pay off vendor's lien, his right to the lien by subrogation, right of sureties on vendee's note to such lien 743
6. lien of assignee of note for purchase money (where no lien was retained in the deed) 317

LIFE ESTATE—
1. life tenant leases land and dies, liability of his lessee for rent . 223

LIMITATION, STAT. OF—See Malicious Prosecution, 1; Taxation, 2; Vendor and Vendee, 6 —
1. husband conveying his wife's land, running of the statute against her 4, 29
2. statute runs against guardian on contract made with him for his ward's benefit 49
3. action on vendor's misrepresentation of contents of tract of land 219
4. right of entry accruing to several, all under disability, when does statute begin to run 301
5. action of mortgagee of personal property to recover of purchaser from mortgagor, when barred 301
6. action by mortgagee of personal property to recover of purchaser from mortgagor, when barred 301

Digitized by Google

LIMITATION, STAT. OF—Continued— PAGE.
7. liability of seller of spurious county bond accrues at date of sale and not at date of judgment in suit against the county holding the bond spurious 252
8. purchasing from one supposed to be principal but in fact agent for another, when statute begins to run against the real principal 352
9. holding land under *parol gift* constitutes adverse possession as against donor 365
10. where the original proceeding was prohibited by law but amended petition was filed setting out good cause of action, statute ran till filing of amendment 368
11. right of State to recover fines and forfeitures collected by city of Lexington is bared by five years 519
12. limitation on patent issued after defendant had acquired good title by adverse possession 594
13. contract of sale being cancelled, right of one eight *years afterwards* to enforce the cancelled contract 520
14. no answer to statute that plaintiff supposed he could not recover if he did sue 520
15. *fraudulent suppression of will*, when action for must be brought, 594
16. *new promise* or acknowledgment as a bar to the statute, cases in Court of Appeals reviewed 608
17. action by landlord against tenant for proceeds of sale of timber, no limitation on tenant's claim to credit for improvement . . . 742
18. claim against surety barred after seven years, though he was not known as surety 743
19. surety on note on which judgment has been obtained is released after seven years from date of judgment, effect of his death or death of principal 743
20. surety on bond to commissioner for purchase price of land when limitation begins to run against 743
21. action by State to recover penalty for breach of penal statute is embraced by statute of limitations 90
22. infant devisee, statute begins to run in favor of surety of executor not from appointment of guardian but majority of infant . 296
LIS PENDENS—
1. judgment dismissing petition reversed on appeal, effect of . . 743
LOCAL OPTION—
1. indictment should charge each sale in distinct paragraphs as a separate offense 110
2. what constitutes *wholesale* dealer 113
3. right of distiller to sell spirits at his residence 219
4. indictment for selling bottle marked "*Bitters*," evidence admissible that contents were "intoxicating" 221
5. in prosecutions under the law must be shown to be in force in the particular locality, mode of averring and proving this . . . 306, 520, 664
6. if this proof is not made peremptory instruction goes for defendant 306
7. act not unconstitutional because it allowed districts that had previously adopted it to vote again on the question 789
8. variance in the form of putting the question from that specified in the act, effect of 789
LOST WRITING—
1. statement of attorney who drew it as to its contents is competent 658
LOUISVILLE LAW AND EQUITY COURT—
1. has power in case transferred from Louisville Chancery Court to set aside order made before transfer 511

Digitized by Google

LUNATIC— PAGE.
1. right of creditor of lunatic to sue defaulting trustee 521
MALICE—
the fact of killing in sudden heat and passion does not necessarily preclude malice 448
MALICIOUS PROSECUTION—
1. limitation on action is one year 448
2. liability for maliciously advising judge to render a judgment . . 220
3. necessary allegations in action for maliciously suing out attachment 511
MANDAMUS—
1. to compel school trustee to report to county commissioner . . . 521
2. motion for must be made on the day named in summons . . . 664
3. officer having direction to act or not, right of court to compel him to act or to control his action 756, 744
MANDATE—
1. petition for rehearing being granted and new mandate issued they are to be considered together 449
2. mandate announcing no principal but correcting single item in commissioner's report, effect of 449
MANSLAUGHTER—See Homicide—
1. evidence to show accused avoided instead of seeking the quarrel is competent 48
2. witnesses' thoughts about movements of deceased not being communicated to accused are incompetent 48
3. evidence competent to show person of deceased was examined before and after the killing and that he was unarmed 48
4. one who acts recklessly of human life, if death ensue, is guilty of voluntary manslaughter 334
5. one convicted of manslaughter may, on new tril, be convicted of murder 181
MARRIED WOMAN—See Acknowledgement. Husband and wife—
1. will made by her *during* coverture and acknowledged *after* death of husband, effect of 60
2. Gen. Stat., chapter 113, section 11, as to manner of re-executing wills does not apply to married women 60
3. right to vacate erroneous judgment after expiration of term . 250
4. alteration in Code of '77 applies to judgment rendered under former Code 250
5. may mortgage general estate to secure husbands debt 301
6. her bond for title is void 365
7. no personal judgment against widow on contract made by her during coverture 518, 664
8. authorized to make note by law of State of her domicil, validity of here 645
9. allegations of petition against her are taken as true unless denied, 664
10. right of one failing to perform his contract with a married woman to set up her coverture as defense 744
11. effect of infant married woman joining in her husband's deed . . 201
12. her right to recover her land because of defective acknowledgment after she had sold tract received on exchange 29
MARSHALL, CHIEF JUSTICE—
1. his opinion on constitutional questions was always that of his court except in one case 751
MASTER AND SERVANT—
1. master not liable for injuries received from dog owned by servant 50
2. master employing servant, knowing he is without experience, servant bound to fidelity only 366

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MEASURE OF DAMAGES— PAGE.
1. for ordinary negligence damages can be compensatory only . . 449
2. proper measure in action for breach of warranty or deceit . . . 671
3. in trover 656
MECHANIC'S LIEN LAW—
1. of Louisville, assignment of lien, rights of sub-contractor against assignee 301
2. no lien for less than $10 301
3. sub-contractor must allege that he gave notice of his lien . . . 302
4. no lien exists unless the account is filed in 60 days and suit is brought in 12 months 594
5. petition must allege facts sufficient to show *personal* liability, 595, 597
MINES—See Land, 1.
MISDEMEANORS—
1. reversing judgment on appeal of Commonwealth 131
2. where punishment is by imprisonment 289
3. judge trying facts, effect given his findings 306
MISJOINDER—
1. of actions waived by answer 511
MISTAKE—
1. relief for gross mistakes in measurements for masonry, though the contractor agreed to assume all risks from mistakes 441
MORTGAGES—
1. purchaser of land subject to, not personally liable 308
2. purchaser of house subject to, insuring it, mortgagee not entitled to benefit of 308
3. conveyance of land with agreement by grantee to reconvey on payment of sum of money is a mortgage 366
4. mortgagor of stock of goods remaining in possession and buying and selling, rights of mortgagee as against creditors 366
5. rights of one induced by misrepresentations of mortgagor to give up a senior mortgage and accept a junior 447
6. exactness required in describing the debt and the property mortgaged 727, 744
7. court refuses to consider deed absolute in form as a mortgage . 442
MUNICIPAL CORPORATION—
1. lien of for taxes lost by sale made by State for its taxes 224
2. exacting license from owner of dog is not liable for injury done by the dog 224
3. liability of for failure to abate nuisance or close up a bawdy house 292
4. not liable for property destroyed by its failure to provide fire engines 449
5. judgment against can be enforced out of its private property only 361
6. for what offenses it may be indicted 292
MURDER—See Malice—
1. curious instance of several innocent persons hung for murder of man afterwards found alive 151
2 burglar being wounded conceals himself in outer shed where he is found next day and attacked, had he killed his assailant was it murder? 375
3. drunkenness no excuse for 443
4. though combat was mutual, yet if accused had deadly weapon the killing was murder 448
5. a woman who escaped conviction for murder of a former husband by marrying chief witness for prosecution 604
6. punishing the murderer of a *woman* by a fine of $2 752
7. one convicted of manslaughter may on retrial be convicted of murder 181

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NATURALIZATION— PAGE.
1. right of Indian to become citizen of United States without being naturalized 528
NECESSARIES—See Husband and Wife, 8, 9, 10—
1. what are necessaries for infant 579
NEGLIGENCE—See Damages, 1, 2; Railroads—
1. the court should not tell the jury what facts constitute contributory 219
2. for *ordinary* negligence the jury can give *compensatory* damages only 449
3. where special verdict found negligence against defendant and also contributory negligence against plaintiff the court properly entered judgment for defendant 689
4. in action for *willful* neglect, contributory negligence as a defense, 694
5. in action by employe against employer for defective machinery, necessary allegations 219
NEW BOOKS—
Advocacy, illustrations in 649
American Probate Reports, volume III 44
Attachment and Garnishment, treaties on 583
Attorney-General of the U. S., his annual report for 1883 93
Corporations, treaties on law of private, having capital stock . . . 44
Corporations, liabilities of directors and other officers 372
Corporations, transfer of stock in 437
Decrees, treaties on 437
Equity, principles of 650
Extradition, treaties on 371
FEDERAL DECISIONS, by Wm. Myers—
Volume IV 148
Volume V 371
Volume VI 582
Volume VII 732
Volume X 506
Foreign Judgments, treaties on 372
Frauds, Statute of, treaties on, 3 volumes 44, 213
Habeas Corpus, treaties on 94
Humphrey, A. P., address by 503
Kentucky, History of, by N. S. Shaler 502
Law Quarterly Review 504
Married Woman, treaties on, 2 volumes 436
Mortgages, treaties on 371
Mexico, laws of 505
Practice, treaties on 437
Presumptive Evidence, treaties on 733
Questions submitted to classes in Cincinnati Law School 213
Railroads, treaties on 372
Real Property, treaties on 372
Speeches, &c., of David Dudley Field, 2 volumes 213
Taxation, treaties on, 2 volumes 40. 286
Warranties, law of in the sale of chattels 45
NEW TRIAL—
1. discovery of new evidence from witness who has already testified 205, 220
2. petition founded on such ground, time of filing 205
3. no ground for that witness did not testify or testified otherwise than was expected of him 220, 408
4. ruling of lower court on motion for will not be disturbed unless plainly erroneous 220
5. decision of trial court on motion for in criminal case is not reversible 335, 305, 227

Digitized by Google

NEW TRIAL—Continued— PAGE:
6. time of making motion reckoned from verdict and not from entering of judgment 665, 302, 307
7. court may require payment of costs of former trial but not of all costs 302, 595
8. party has 40 days to pay costs though the order gives him less . 302
9. person moving for becomes party to the action 303
10. decree in action for, vacating all orders prejudicial to petitioner, effect of 303
11. order overruling motion for, right of court to set aside order after expiration of term 367
12. time of making motion for in Louisville Chancery Court 367
13. no reversal for error not set out in grounds for 369
14. filing additional grounds after expiration of time 450
15. setting aside order granting new trial for failure to pay costs, not reversible 595
16. action for is equitable or ordinary according to character of original proceeding, competency of witnesses in such action . . 595
17. new trial on account of smallness of damages 657
18. party asking new trial abandons previous motion for judgment on the verdict 665
19. misconduct of jury first complained of on motion for new trial, 523
20. time of moving for, where there is special verdict 745
21. one convicted of lesser offense moving for new trial may be convicted of greater offense on retrial 181
NON-RESIDENT—
1. attorney for, liability for his fee 303
NUISANCE—
1. liability of city for failure to abate 292
NULLA BONA—See Fraudulent Conveyances, 2, 3, 10—
1. amended petition setting out return of *nulla bona* judgment thereon without process is void 218
2. filing of the bill created no lien on life estate of husband in land of wife then living 363
3. action on return of, in what county it must be brought 670
OBSTRUCTING PUBLIC ROAD—
1. Indictment for, necessary allegations 521
OFFICIAL LIABILITY—
1. of judicial officers acting within their jurisdiction 220
2. of president and directors of bank for violating the charter . . 328
3. clerk employed by public officer is liable to him and not the public for misappropriating money 34
OPINIONS—
1. practice of requiring all opinions to be in writing 755
OPPRESSIVE BARGAIN—
1. note executed by *cestui que trust* to her trustee for balance due and ten per cent. interest 669
OVERRULED CASE—
1. Paducah, &c., R. R. Co. v. Commonwealth 227
PARDON—
1. right of Parliament to grant conditional pardon 375
2. pardoning criminals immediately after conviction, the policy of, 530
PARENT AND CHILD—
1. right of father to custody of child 3
2. liability of one employing minor in dangerous business over objection of parent 367
3. right of son to recover for maintenance of his mother 665
PAROL EVIDENCE—
1. admission of where both parties admit that the writing does not contain the true agreement 362
2. admissible to show circumstances under which deed was made . 361

Digitized by Google

PARTIES— PAGE.
1. plaintiffs claiming under one title may sue several defendants claiming under same title though they claim *different* parts of the land 99
2. one on whose motion certain parties were striken out as plaintiffs can't afterwards complain that they were not made parties, 289
3. right of one who claims interest *hostile to* both plaintiff and defendant to be made party 308
4. suit by *one* partner on *firm* contract is fatal defect of parties . . 221
5. promise to debtor to pay his debts, right of one creditor to sue without joining others 707
6. action dismissed without prejudice for defect of parties 746

PARTITION—
1. action for, who are necessary parties 559

PARTNERSHIP—
1. a partner has the right to *sell* but not to *pledge* partnership property 168
2. right of individual creditor levying on partnership property . . 220
3. suit by *one* partner on *firm* contract, fatal defect of parties and not waived by demurrer 221
4. sale by partner of his interest in the firm, rights of the purchaser 303
5. suit to settle partnership affairs, no accounts kept, petition will be dismissed 303
6. money borrowed in contemplation of partnership but before the terms had been agreed on, firm is liable 367
7. partner can't relieve himself from liability for money paid to copartner by giving notice not to trust him; must dissolve 367
8. the facts show that the father had taken his sons into partnership and they are entitled to share in the profits after paying him *interest* on his *capital* 521
9. right of one partner to sign firm name to negotiable paper . . 596
10. firm real estate, how far regarded as personalty 665, 699
11. right of widow to dower in firm real estate 665
12. no partnership existing when land was bought, effect of its subsequent formation on right to dower 666
13. partner assigning firm assets for benefit of creditors, effect of . 652
14. duty of assignee as to attaching firm creditors 652
15. a trade mark is part of partnership assets 95
16. firm property levied on for individual debt, right of partners to sell such property 220
17. real estate, when regarded as partnership property 665

PATENTS—
1. giving number of acres and names of owners of exclusions, not void for uncertainty 108
2. State can issue but one patent for same tract though it should acquire title a second time 108
3. containing exclusions, duty as to showing that the land claimed is not excluded 504
4. valid patent can not be issued for land previously surveyed and occupied 666
5. patent for certain number of acres "excluding all surveys of record" void for indefiniteness 682

PEDDLER'S LICENSE—
I. required of all peddlers, effect of amending act exempting peddlers residents of this State 349, 711

PENALTY—
1. in action for by Commonwealth appeal lies from county to circuit court 90

PENSION MONEY—
1. its liability for debts of pensioner 304, 666, 745

Digitized by Google

PERSONAL REPRESENTATIVES—See Decedent's Estate, 3, 4— PAGE.
1. failing to make settlements, no compensation 95
2. suit against administrator for goods sold intestate, denial of knowledge or information is sufficient 341
3. right of personal representative of one *maliciously* killed to recover damages 499
4. presumption that commissioner in making his settlement charged administrator with proper interest 596
5. administrator refused credit for his expenses in trying to enforce fraudulent contract 596
6. degree of care required of in managing the estate 596
7. liability for failing to sell slaves 596
8. right of devisee accepting note belonging to the estate in payment of debt due him by the executor 670
PETITION FOR REHEARING—
1. mandate issuing on, the two are to be construed together . . . 449
2. error waived in the petition, effect of 449
3. filing in vacation 214
4. filing in Superior Court, effect of on time for appealing to Court of Appeals 509
PLEADING—See Defenses; Malicious Presentation, 3; Practice in Civil Cases, 8, 10, 16, 21; Taxes, 11—
1. in action for work done, answer denying indebtedness and pleading payment, *held*, the value of the work was not in issue . . . 65
2. insufficient denial of indebtedness 221
3. suit on contract to pay money must allege breach 221
4. suit for delivery of personal property where there are several articles, necessary allegations 221
5. proving *allegations of value* or damage though not traversed . . 304
6. meaning of section 115, Civ. Code, requiring pleadings to be "*signed*" 318
7. in action for goods sold necessary allegations of petition 341
8. allegations defectively stated or omitted cured by form of issue requiring proof of such facts 341
9. suit against administrator for goods sold interstate, denial of *knowledge or information* is sufficient 341
10. suit on bond to pay money on condition, performance of condition not sufficiently pleaded 522
11. in suit on account it should be alleged the goods were worth the amount charged 522
12. defect *in substance* in petition not cured by pleading over, answer must expressly allege the omitted matters 596
13. plea of *non est factum* must be affirmative—denial of knowledge or information insufficient 596
14. in construing a pleading inferences favorable to the pleader not indulged 597
15. allegations of answer which simply contradict allegations of petition require no reply 597
16. right of parties to waive written pleadings 668
17. the issue as to payment, held, fully made up 745
18. denial of "knowledge or information" as to a judgment 745
19. though unnecessary to allege any consideration, that set out must be proved 440
20. pleading acts of another State 449
21. suit against corporation, petition should allege the incorporation, 522
22. necessary allegations can't be supplied by exhibits 597
23. denials should not be conjunctive or of conclusions of law . . . 666
24. in action to subject separate estate for debt, necessary allegations 669
25. defects in pleading cured by verdict 304
26. failure to deny immaterial allegation, it should not be accepted as true 522

Digitized by Google

POMEROY, JOHN NORTON— PAGE.
1. notice of his death 582
POSTHUMOUS CHILD—
1. right to recover his share of his father's estate sold by order of court in action brought before he was born 176
2. not estopped because he had previously sued his guardian for the proceeds of sale 176
POWER OF ATTORNEY—See Separate Estate, 1—
1. deed made under is valid though the power was not recorded . . 666
2. revocation of the power does not affect title of purchaser without notice 667
POWERS—
1. devise of absolute estate to one, giving power to sell and reinvest to another 381
PRACTICE IN CIVIL CASES—See Parties, 2—
1. what defects in pleading are cured by pleading over or by verdict 304, 341, 596
2. several *cases ordered heard together*, admission of fact in one is such in all 307
3. must be *both objection and exception* to motion to strike out part of a pleading 307
4. where plaintiff is entitled to *judgment by default* the case need not be placed on the trial docket and submitted 307
5. party obtaining rule and *failing to cause court to act on* can't complain 307
6. defendant objecting to filing of petition of one to be made party did not *waive* the objection by asking time to answer 308
7. the finding by court or jury of a fact *denied* by the *petition*, no benefit to plaintiff 369
8. no right to file *supplemental pleading* setting up new facts after judgment *affirmed* on appeal 450
9. order sustaining motion to set aside judgment *relates back* to making of motion 510
10. *erroneous* to dismiss petition pending reference to commissioner, 523
11. judgment filed with clerk in vacation, motion to set it aside overruled at next term, effect of 523
12. two defendants appointed to defend for all can't bind any whose interests are adverse to theirs 597
13. case submitted on exceptions to commissioner's report, *error to dismiss* petition 598
14. party asking new trial *abandons* his *previous motion* for judgment on the verdict 665
15. party compelled to *elect between defenses* may amend his answer so as to set out more fully the defense he abandons 667
16. action should be dismissed without prejudice for *defect of parties* 746
17. *mistake in sueing in equity* instead of at law, how taken advantage of 746
18. petition stating no cause of action against any defendant dismissed though only one demurred 746
19. *motion* to require plaintiffs to elect was *waived* by failure of court to act on it 746
20. court overruling demurrer or objection to a pleading but afterwards concluding to sustain it should give leave to amend . 307, 318
21. one who can't complain of verdict cannot of the judgment . . . 309
22. right of parties to waive written pleadings by oral agreements . 667
23. form of order allowing wife to prosecute action in her own name, 297
24. plea of limitation defective but no objection being then taken it can't be afterwards made on appeal 448

Digitized by Google

PRACTICE IN CRIMINAL CASES— PAGE.
1. no reversal for improper *argument* of Commonwealth's attorney not objected to 50
2. under indictment for *robbery* accused may be convicted of *larceny*, 195
3. failure to instruct that the offense must be proved beyond *reasonable doubt*, reversible error 222
4. accused *absconding* before jury returned its verdict, no ground for reversal 305
5. in such case delay in entering judgment until his re-arrest, no ground of reversal 305
6. discretion of trial court in permitting additional evidence after party has announced himself through 306
7. witness testifying without being sworn and without appellant knowing he had been in penitentiary, this no ground for discharging jury and continuing case 407
8. failure of witness to testify as expected of him no ground for discharging jury for new trial 220, 408
9. conduct of Commonwealth's attorney in ordering witness to conceal facts from accused, ground for discharging jury and continuing case 408
10. court can reverse verdict only when there is no evidence to show guilt 450, 523, 597
11. indictment charging several offenses is demurrable, but court overruled demurrer and required prosecution to elect, no error . 221

PRESUMPTIONS—
1. no presumption of receipt of letter from fact of its being mailed properly addressed and stamped 481
2. English courts assume innocence of accused—the French his guilt 580
3. presumption of death arising from one's absence, effect of receiving letters 739
4. party having possession of books refusing to produce them, presumption therefrom 659

PRINCIPAL AND AGENT—See Agency.

PROCESS—See infant's Real Estate, Sale of, 3, 5—
1. summons being lost proving the return by clerk's entry on rule docket and recitals in judgment 523
2. absurd rule throwing out cross bill in which defendant fails to pray for process 580
3. service on administrator who paid merely for infant's maintenance was not "*the person having charge of him*" 598
4. affidavit for attachment defective but process properly served, judgment not void 532
5. amended petition setting up return of *nulla bona*, there must be process on 218

PROMISSORY NOTES—See Bills and Notes.

PURCHASE MONEY—See Vendor and Vendee.

PURCHASER—See Innocent Purchaser.

QUIA TIMET—
1. this bill distinguished from bill of peace 86
2. is the proper remedy against hostile claims affecting the marketability of a title 102

RAILROADS—See Negligence; Stock, Damages to—
1. stock injured by failure to keep up fence, road is liable 17
2. dead beat injured while stealing a ride can't recover for negligence of the road 56
3. passenger dropping valuables, road not obliged to stop train . . 56
4. rate of speed through town—giving signal of approach of train—deceased of weak intellect—willful neglect 95, 163, 302
5. care required of road as to trespassers on the track 163, 223

Digitized by Google

RAILROADS—Continued— PAGE.
6. action for injury to employe from defective machinery, necessary allegations 219
7. the breakman assumes all *ordinary* risks 220
8. declarations of fireman inadmissible to show company's knowledge of defective machinery 223
9. not liable for damage done by escaping sparks where it provides the screen required by statute 240
10. evidence as to custom of the road to carry this screen thrown back so that it did not really prevent sparks from escaping . . 240
11. compromise of claim against railroad for personal injury made under pecuniary distress is void 263
12. rate of speed in approaching crossings 302
13. evidence inadmissable that no one but plaintiff was ever killed at that crossing 302
14. indictment for failure to repair highway crossings and approaches 308
15. duty as to providing latest improvements in machinery 308
16. running trains across highways without giving warning signal, defective indictment 309
17. liability of, employing minor as brakesman without consent of his parent 366, 784
18. in action based on *ordinary* negligence it must be alleged injured party was not employed by the road 307
19. passenger leaving train while in motion by direction of conductor, liability of road for injury 367
20. right to make lower rates for one shipper than for another . . 376
21. liability for permitting passenger to ride in dangerous place in which he is injured 599
22. right of road to compel connecting road to stop its trains at the point of junction 611
23. one road has no right to run its trains over track of connecting road 611
24. one riding an unmanageable horse, care required of those in charge of approaching train 664
25. right of passenger to exemplary damages for willful misconduct of conductor of train 512, 668
26. *engineer* and *conductor* are not *fellow-servants* 752

RAPE—
1. stating age of female in the indictment 221

RECEIPT—
1. effect of receipt given by a woman to her confidential adviser or brother 584, 599

RECITALS—See Deed, 1—
1. mere recital in a deed of existence of alley, effect of as a dedication of grant 253

RECOGNIZANCE—
1. to answer an indictment, though not authorized by Code, are valid 524
2. effect of general order of continuance 524

RECORD—
1. entering *nunc pro tunc* order where nothing to amend by appears in record 451

RELEASE—
1. releasing one bound *ex contractu*, effect of upon liability of one bound in tort 328
2. of one of several obligors does not *always* release the others . . 668

RELIEF—
1. no relief whether prayed for *specially* or *generally*, inconsistent with the facts set out in the pleadings 6

Digitized by Google

PAGE.
RELIEF—Continued—
2. amended petition claimed only lien on land, relief was properly based on it and not on the original 522
3. prayer for enforcement of agreement to buy land for plaintiff, proper relief 666
REMAINDERS—
1. rights of remainderman to unconsumed profits at death of tenant of defeasible fee 589, 657
2. prohibition of sale for reinvestment applied to life estate and not remainder 513
REMISSIONS—
1. effect of remitting forfeited bail bond on officer's commissions . 200
RENT—See Joint Tenant, 1, 2—
1. attachment for, affidavit must be made before officer who issues, 223
2. after order sustaining attachment for, tenant can't deny his tenancy or liability for rent 359
3. defective affidavit for attachment, effect of omissions 359
4. recission of contract for exchange of lands, right of parties to rents and improvements 719
1. death of life tenant, liability of his lessee for rent 223
REPLEVIN BOND—See Assignment, 1.
RES ADJUDICATA—
1. the transcript being complete and showing nothing to sustain the plea, judgment reversed 51
RES GASTÆ—
1. statement by mother of deceased made in *afternoon* of day of killing 50
2. statement of agent made during performance of tort binds principal, but statement of mate and clerk on steamboat made *many days after* accident do not bind owner 294
3. statements made 10 or 12 days after the tort complained of, not *res gestæ* 444
RESCISSION—
1. innocent misrepresentation of title, no ground for 267
2. sale for delivery in installments, right of purchaser to rescind for failure to deliver one installment 451
3. contract for exchange of land received, right of each party to rents and liability for improvements 719
4. rescission of fraudulent deed and equities adjusted though both parties wrong-doers 622
5. upon rescission of sale of land vendee was entitled to lien for amount due him 601
RESULTING TRUSTS—
1. purchase price of land paid by one but deed made to another, rights of creditors 786
REVIVOR—
1. confirmation of report of sale after death of *defendant* and *before* revivor is void 517
2. of judgment demand is necessary, mode of objecting that none has been made 747
3. order reviving judgment may modify it 747
4. right to appeal from order reviving action 514
RIPARIAN OWNERS—
1. rights of riparian owners 225
2. a city may claim the rights of a riparian owner 226
3. rights of upon a non-navigable stream 671
ROADS, PUBLIC—
1. report of viewers sufficiently specific as to advantages of, and metes and bounds 235
2. appeals in road cases, jurisdiction of Court of Appeals to try . . 584

Digitized by Google

ROADS, PUBLIC—Continued— PAGE.
3. one applying for removal of gates from public road, his liability for costs 737
4. notice must be given before closing a road 747
ROBBERY—
1. indictment for robbing one of a *silver dollar* and a *warrant* of arrest does not charge distinct offenses 229
2. right of convict of larceny under indictment for robbery 195
SALARIES—
1. of judges of circuit and appellate courts in the various States, 603, 675
SALE OF PERSONAL PROPERTY—See Lien, 1; Rescission, 2—
1. sale of property in possession of vendor's agent, the latter agreeing to hold it as agent for vendees, this was sufficient delivery . 527
2. sale incomplete if anything remains to be done to goods 77
3. alternative remedies of vendor where vendee refuses to accept goods 77
4. mistakes of appraisers chosen to fix value of goods, effect on rights of parties 655
5. sale of growing crop to be delivered when gathered, title does not pass 669
SELF-DEFENSE—
1. particular instruction correct as to right of accused to stand and defend himself 47, 50
2. accused being the agressor did not act in self-defense in killing deceased 51
3. one may act on appearances "as they seem to him" 370
4. same rule as to all temperaments, nervous or phlegmatic . . . 370
SEPARATE ESTATE—
1. right to give power of attorney to sell 68
2. right of married woman to change her general into separate estate by contract made directly with husband 97
3. defined and mode of creating specified 97
4. married woman making note presumably intended to bind separate estate, effect of payee requiring her to insure her property. 97
5. if not liable at making of contract can't become so afterwards 519
6. may bind her separate estate by *verbal* contract and without concurrence of husband 599
7. action to subject, what facts should be alleged 669
8. right of husband to curtesy in 588
9. liability of separate estate for her debts 669
SHERIFF—See Executions, 2; Surety, 11—
1. cannot appoint deputy to execute process in another county . . 334
2. liability of such deputy for homicide committed while executing process 334
3. in action against sureties of sheriff the covenants of the bond and their breach must be alleged 346
4. sheriff is liable for acts of one who, though not formerly appointed deputy, yet habitually acts as such 346
5. not liable on his bond for tax collected under unconstitutional act 413
6. can't collect fines due State except by process 524
7. liability of deputy acting for sheriff in his capacity of public administrator 524
8. suit against sheriff and sureties on county levy bond, necessary allegations of petition 599
9. lien of ex-sheriff for unpaid taxes lost by delay in enforcing . . 498
10. liability of deputy and his sureties for his failure to collect taxes listed with him 600
11. county creditor enforcing claim against sheriff by notice, what notice must contain 215
SLANDER—See Libel and Slander.

Digitized by Google

SLEEPING CAR COMPANY— PAGE.
1. liability to passenger for loss of valuables 279
SPECIAL JUDGE—See Election, 1—
1. his acts as *de facto* officer are valid though he was not properly qualified 525
2. can't be chosen for *whole* term, but parties agreeing such judge may try their case are estopped to complain 17
STATE—
1. right of citizen to sue his State in Federal courts 57
STATUTES, CONSTRUCTION OF—See Constitutional Law, II—
1. act repealing a statute repeals any amendment to it 223
2. violation of statute may be punished after the statute is repealed, 520
3. act in terms amendatory of another will not be held to repeal it —repeals by implication not favored 711
4. a general statute and subsequent local one will both be upheld . 755
5. act granting exemption from taxation to be strictly construed . 495
6. act constitutional in part and void in part 789
7. meaning of the word "co-extensive" used in defining jurisdiction of a court 656
STATUTES, GENERAL AND REVISED—
The following chapters construed:—
1. GENERAL STATUTES.
chapter 1, section 6 . . . . . 14, 500
" 5, article 4, section 5 201
" 13 290
" 13, section 2 27
" 16, article 1, section 6 . . . . . 31, 11
" 18, article 7, section 16 521
" 22, section 1 455
" 22, section 20 415
" 24, section 36 69
" 27, article 3, section 9 599
" 28, article 7, section 1 18
" 29, article 11 230
" 29, article 17, section 1 442
" 29, article 28, section 7 656
" 31, section 2 179
" 31, section 5 471
" 31, section 9 622
" 33, article 6, section 6 234
" 38, article 13, section 14 552
" 39, section 9 203
" 39, article 2, section 29 223
" 44, article 1, section 10 363
" 47, article 1, section 4 . . . . . 58, 124
" 50, article 3, section 1 378
" 52, article 2, section 2 648
" 56, section 5 292
" 57, section 3 . . . . . 367, 500
" 60, article 1, section 6 212
" 63, article 1, section 21 381
" 63, article 1, section 19 787
" 71, article 1, sections 1 and 2 30
" 71, article 3, section 6 448
" 75, section 9 440
" 92, article 2, section 9 576
" 92, article 5 91
" 94, article 1 584
" 94, article 1, section 3 236
" 94, article 1, section 29 755
" 94, article 1, section 35 755
" 100, sections 7 and 10 337

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STATUTES, GENERAL AND REVISED—Continued— PAGE.
chapter 104, section 9 768
" 104, section 11 187
" 106, articles 1 and 2 576
" 109, section 3 108
" 113, sections 2, 5, 11 60
" 113, section 12 376
2. REVISED STATUTES.
chapter 24, sections 14 and 23 . . . . . 11, 478
STOCK, DAMAGES TO—
1. injured by railroad's failure to keep up fences, the road is liable, 17
2. railroad must consider safety of train, in so doing not liable for killing stock 370
3. railroad is liable for killing stock where it admits the killing and value of the stock 668
4. owner of stock allowing it to stray upon the track, not contributory negligence 744
STOCKHOLDER—
1. is liable to creditor of insolvent corporation for amount of unpaid stock 397
2. officer contracting debt in excess of amount authorized by charter having paid it off, his right to contribution from other stockholders 398
STREET IMPROVEMENTS—See Final Order, 4—
1. contracted for by council without observing provisions of charter, lot owner not liable 237
2. the judgment of the city council as to the necessity of is conclusive 237
3. in Louisville the *whole square* is liable for costs of improving an alley 309
4. action to recover for, petition must allege publication of ordinance 451
5. cost of improving alley, how apportion 600
SUBROGATION—See Lien, 5; Surety, 11.
SUGDEN, SIR EDWARD—
1. insisting that his wife, who had been his mistress, should be received at court 581
SUMMONS—
1. return being lost, proving it by clerk's entry on docket and recitals in judgment 523
SUPERIOR COURT—See Appeal, 21—
1. its decision *reversing* lower court, right of appeal from, where amount in controversy is less than $1,000 462
2. what is the amount in controversy where there are distinct judgments in same action against different persons 462
3. time for appealing to Court of Appeals, filing petition for rehearing, effect of 509
SUPERSEDEAS—See Appeal, 17—
1. dismissal of appeal, effect of 777
2. the bond being to answer madate of *Court of Appeals*, effect of dismissal by *Superior Court* 747
SURETY—See Contribution, 1, 2, 4, 5; Defenses, 1; Limitation, Stat. of, 18, 20, 22; Sheriff, 3, 8, 10
1. may require principal to pay the debt but cannot have judgment against him for its amount 224
2. creditor accepting new notes which were forgeries as to surety did not thereby *release* surety 224
3. on sheriff's bond, in action against for illegal seizure, breach of the bond or that surety approved the seizure must be alleged . 346
4. one authorizing another to sign for him as surety must do so in writing *signed by himself* 413

Digitized by Google

SURETY—Continued— PAGE.
5. surety paying debt for which he is not liable cannot recover it of his principal or enforce a lien on land by which the debt was secured 413
6. not released by failure of creditor to prove his claim against deceased principal or co-surety within one year 525
7. may set aside fraudulent conveyance of principal 591
8. agreement of guardian to give time to former guardian to settle his accounts, effect of as a release of sureties of the latter . . . 600
9. surety in guardian's bond, effect of creditor failing to sue principal or co-surety 600
10. B and C signing A's note are sureties and have the rights of such against each other 601
11. surety on sheriff's bond who pays the State taxes due by delinquents not subrogated to State's rights; so if he pays deficit due by defaulting sheriff 413, 628
12. surety suing to compel principal to pay the debt, what he must allege 747
13. same person being executor and trustee, liability of the surety on the executorial bond 747
14. surety paying off debt by *executing his note* is entitled to assignment of all securities held by creditor just as if he had paid in cash 768
15. sureties on vendee's note for purchase money, their right to a lien on the land by subrogation 743
16. assignment for benefit of creditors, liability of sureties of assignee 121
SURGICAL OPERATION—See Homicide.
TAXES—
1. assessments of omitted property not made on information of the proper officer are void 90
2. action to recover penalty for failure to list property may be barred by limitation 90
3. merchant in city of Louisville who pays license tax on merchandise, his liability to further taxation 258
4. tax in aid of turnpike collected and squandered by officers, right of turnpike to collect further tax 370
5. a county has constitutional right to tax so much of a turnpike as passes through it 391
6. railroad charter providing for a specified tax and "*no more*" for State purposes, liability for *county* taxation in addition 495
7. act granting immunity from taxation should be strictly construed 495
8. lien of ex-sheriff for unpaid taxes lost by delay in enforcing . . 498
9. no interest on taxes as damages 516
10. mortgagee paying taxes, his right to superior lien for amount so paid 525
11. in action to enforce lien every step necessary to create it must be alleged 525
12. operation of the act establishing a board of equalization 601
13. collection of taxes does not properly belong to the courts . . . 628
14. in suit to enforce taxes due city of Louisville, publication of notice required by charter must be alleged 748
15. failure to object for such defect not waived 748
16. board of trade of a city performs no public services and can't be exempted from taxation 769
17. purchaser of tax title from State takes free of lien of city for her taxes 224
TELEGRAPH COMPANY—
1. liability of for mistake in sending message 754

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PAGE.

TELEPHONE—
1. contract made by, right of parties to prove what passed between them 481
TIMBER—See Land.
TIPPLING HOUSE—
1. warrant for keeping may be tried before justice 301
TITLE—
1. removing cloud upon, what facts necessary to entitle to relief . . 224
2. innocent misrepresentation of, no ground of rescission 267
3. failure of mother to convey or devise to her children, not a defect 309
TITLE TO ACT—See Constitutional Law.
TOWN MARSHAL—
1. can't execute attachment 510
TRADE-MARKS—
1. are part of partnership assets 96
2. words used to designate the *place* of business and not the *kind* are not trade-marks 561
TRANSCRIPT—See Appeals, 6, 8—
1. order striking out parts of pleadings must be copied into transcript and not into the bill 307
TRANSFER—
1. pleading defense not exclusively cognizable at law, right to transfer from equity 442
2. surety's plea that creditor had released lien on debtor is such defense 442
3. defendant consenting to transfer of ordinary action to equity did not *waive* right to jury trial 222
4. proper mode and time of obtaining transfer to equity 598
TRESPASS AND INJURY TO PROPERTY—
1. indictment for this statutory offense, calling it "malicious mischief" is not bad 656
2. indictment for this offense held sufficient 657
TROVER—
1. in action for, measure of damages is value of property and *interest* and not value of its use 656
2. in action for conversion of horse plaintiff not entitled to recover both the horse and damages for its detention 595
3. denial of ownership and conversion, insufficient 666
TRUSTS—
1. trustee misapplying trust funds to his own debt by consent of one who had control of the fund under the trust deed 225
2. purchase at execution sale under verbal agreement to hold for another, enforceable trust 309
3. devise of estate to trustee to hold *free from debts of beneficiary*, latter is entitled to conveyance free of trust 381
4. devise of absolute estate, right to withhold power of alienation from devisee 381
5. trustee failing to settle his accounts or to show why trust fund did not earn interest is chargeable with compound interest . . 617
6. devise to one as "guardian and trustee" of A, the trust ended with A's minority 443
7. liability of trustee paying out money under judgment afterwards reversed 662
8. note executed by *cestui que trust* to her trustee for balance due and 10 per cent. interest, her right to be relieved from 669
9. declaration of one that he had bought stock for benefit of others did not create a trust 670
10. one accepting trust property in payment of individual debt of trustee acquires no title 670
11. the trust being executed and trustee may be compelled to convey 385

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TURNPIKE—See Taxation, 4, 5 PAGE.
1. no appeal from refusal of county court to take stock in turnpike, 585
USURY—
1. should be pleaded by personal representative; whether pleaded or not, only legal rate allowed 370
2. agreement of borrowed to pay an annual "donation" besides the interest 525
3. plea of not personal to debtor—may be made by junior mortgagee 526
4. need not be specifically charged, it is sufficient if facts be stated showing it to exist 601
5. allegation that note was taken for too much by fraud or mistake, authorizes proof of usury 601
VENDOR AND VENDEE—See Innocent Purchaser, 1—
1. action for purchase money, vendee pleading that vendor misrepresented the contents of the tract, burden of proof is on vendee, 225
2. verbal contract for sale of land, right of vendee to recover purchase money paid by him 452, 748
3. certainty required in describing the land 452
4. land belonging to another by mistake included in the deed, right of vendee to recover its value of vendor 526
5. note for purchase money not payable till claim against the land was paid, right of assignee of the note 536
6. deficit in land as a defense, limitation on plea of 526
7. vendor's lien being of record, delay in asserting it, effect of . . 589
8. upon rescission of contract vendee was entitled to lien on the land for amounts paid by him 601
9. vendee not liable for purchase money unless vendor can pass good title to land and possession of it 670
10. but vendee having had possession 25 years, this was good title . 670
11. purchaser of land, by parol contract, refused a deed, his right to compensation for improvements 748
12. vendee being dead, his right to recover purchase money and compensation for improvements vests in his personal representative, 748
13. no implied warranty in Kentucky—vendor obtaining deed from third parties to vendee, his liability on implied warranty. . . . 748
VERDICT—See New Trial, 20—
1. special verdict in criminal case must be based on facts proved beyond reasonable doubt 19
2. where special verdict is directed court *may*, but is not compelled to, direct a general also 321, 631
3. where special verdict is asked court may refuse to instruct on law of the case, and if it does instruct erroneously it is immaterial 321, 631
4. separate general defined 321
5. must be in writing, can't be supplemented by oral statement of foreman 602
6. special verdict can't be set aside unless flagrantly contrary to the evidence 631
7. where a special verdict is asked the question should be limited to ascertain the prominent facts in issue 686
8. special verdicts are not violative of right of trial by jury . . . 686
9. party who can't complain of verdict can't complain of judgment, 369
10. verdict returned in absence of accused, he having absconded . . 305
11. delay in entering judgment until his re-arrest 305
VERIFICATION—
1. proper mode of verifying pleading 369
VOLUNTARY CONVEYANCE—
1. not void as to debts made *subsequent* to its *execution* but *prior* to its recording 309

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WAREHOUSE LAW-- PAGE.
1. liability of warehouseman for selling goods in violation of his receipt which made them deliverable to *bearer* and not to order . 244
2. warehouseman issuing receipt to one for goods of another and fraudulently selling the goods 244
3. Gen. Stat. do not repeal the act of 1869 244
WARRANTS—
1. need not have same formal conclusion as indictments 301
WARRANTY--
1. the doctrine of implied warranty in the sales of land does not exist in Kentucky 748
2. in action for breach of, what is the measure of damages 671
3. what constitutes a warranty 749
WATER COMPANY--
1. its liability for failing to supply water to extinguish fire 452
WATER COURSES- See Riparian Owners.
WAY, RIGHT OF—
1. parol contract for, is not enforceable 48
2. right of grantee to compensation for improvements 48
WILL--See Devises, 1, 2 -
1. attesting witnesses testifying against, right of court to instruct as to 310
2. evidence of conduct and statements of devisee inadmissable, he not being a witness 310
3. witness testifying that he had expressed the opinion to others that testator was insane, right to call them as witnesses . . . 310
4. widow qualifying as administratrix is not estopped from renouncing the will 453
5. mere *declaration* of intention to make a devise to particular person, rights of the latter 526
6. will held absolute and not conditioned to take effect only if testator died from home 640
7. husband devising wife's property and making other provisions for her which she accepts, effect of 740
8. will executed by woman when married but acknowledged by her when discovered is valid 60
9. right of devisee to testify for himself and as to competency of testator after introducing other testimony 310
10. suit against decedent's estate for services rendered, competency of will to prove their value 589
WITNESSES—See Evidence—
1. testifying without being sworn and without appellant knowing he had been in penitentiary, effect of 407
2. failing to testify as expected of him, no ground for new trial, 220, 408
3. in action to set aside fraudulent conveyance, vendor is competent witness 457, 671
4. woman escaping conviction by marrying chief witness for prosecution 603
5. witness testifying falsely as to one matter, right of jury to disregard his entire testimony 50

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